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No. 80-5

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

RICHARD JOHN McCARTY,
Appellant,

vs.

PATRICIA ANN McCARTY,
Appellee.

On Appeal from the Court of Appeal of California First Appellate District, Division Four

APPELLANT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Does the system of military retirement benefits established by the Congress preempt the State of California from treating Army retired pay as community property divisible upon divorce?

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Lockhart v. Mittlemann, 123 F.2d 703 (2d Cir. 1942) 28, 39

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Law Review Articles:

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Reppy, Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown and ERISA, 25 U.C.L.A. L.Rev. 417, 443-482 (1978) 34

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APPELLANT'S BRIEF ON THE MERITS

Appellant ("the Husband") requests this Court to reverse the decision of the California Court of Appeal awarding Appellee ("the Wife") a 43% property interest in the Husband's Army retired pay.

OPINIONS BELOW

The opinion of the Court of Appeal is unreported. (J.S., App. A) The Memorandum of Intended Decision issued by the Superior Court for the City and County of San Francisco is also unreported. (J.S., App. B) The California Supreme Court rendered no opinion when it denied appellant's Petition for Hearing (J.S., App. C).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). This is an appeal in which the validity of a statute of the State of California is drawn into question on the ground of its being repugnant to the laws of the United States. The state court decision appealed from is in favor of its validity.

The Court of Appeal denied the Husband's appeal by order and opinion entered February 6, 1980. On March 17, 1980, the Husband filed a Petition for Hearing within the period prescribed by Rule 28 of the California Rules of Court, before the Supreme Court of California. That Petition was denied by order dated April 3, 1980. The Husband then petitioned this Court for a hearing on June 30, 1980. This Court granted the hearing by order dated October 20, 1980, 49 U.S.L.W. 3289, reserving jurisdiction until hearing the merits of the dispute.

The Wife has moved under Rule 16(1)(a), (b) "to dismiss this Appeal for want of jurisdiction, and because the federal question sought to be reviewed was not properly raised below."

Section 1257 of Title 29 refers to "[f]inal judgments or decrees rendered by the highest court of the State in which a decision could be had." The Husband raised the federal preemption issue, i.e. that application of § 4803 of the Cal. Civ. Code to the Husband's Army retired pay was repugnant to the laws of the United States, before the highest court of California in which a decision could be had, and, indeed, raised it before each court.

(1) In his opening brief before the Court of Appeal, dated October 17, 1978, the Husband formulated the second issue presented as follows:

> "Does federal law relating to Army retirement pay preempt the application of § 4803 Civil Code to allo-

> cate the husband's right to receive future pension payments to the Wife?"

In addition to arguing the federal preemption issue in that memorandum, the Husband filed a reply memorandum on February 22, 1979, forwarding a slip opinion for the attention of the Court of Appeal, of the decision of this Court entered on January 22, 1979 in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, which had then just recently issued. In this reply memorandum, the Husband argued that the *Hisquierdo* decision had strengthened the Husband's argument that § 4803 was repugnant to federal law in its application to Army retired pay. On April 29, 1979, the Wife was granted special leave to file a supplemental brief. By memorandum dated July 3, 1979, filed pursuant to special leave, the Husband again argued the federal preemption issue. The conclusion to that memorandum summed up "[t]hat the *Hisquierdo* decision confirms the establishment of a federal scheme re military retirement pay which preempts state law."

In its order and opinion the Court of Appeal summarized the Husband's arguments as follows (J.S. 57):

> "The Husband also contends that the Federal scheme of military retirement benefits preempts all state community property laws with respect thereto, and that California courts are accordingly precluded by the Supremacy Clause from dividing such benefits as the interlocutory judgment orders."

In his petition to the California Supreme Court the Husband presented the issue as follows:

> "Has the Federal law preempted the application of California's community property regime so as to bar the Wife's claim under § 4803 of the Civil Code to an

allocable portion of the Husband's army retirement pay?"

The Husband raised similar arguments before the Superior Court.[a]

It is clear that the claim of repugnancy of California's quasi-community property statute, as applied to Army retired pay, to federal law was brought to the attention of the appropriate state court with fair precision, in due time, and with adequate presentation. *Street v. New York,* 394 U.S. 576 (1969); *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63 (1928).

If, for any reason, the Court determines that the case is not properly before it on appeal, the Husband requests that his Jurisdictional Statement be treated as a Petition for Certiorari under 28 U.S.C. § 2103 and that certiorari be granted.

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[a]The Husband filed two memoranda with the Superior Court arguing that under federal law he had "no proprietary interests subject to division upon marital dissolution" in his contingent Army retired pay, so that California could not apply its quasi-community property concepts to award a portion of his retired pay to the Wife. (Memorandum dated April 8, 1977, R. 105, 112-115; and Memorandum dated April 22, 1977, R. 163, 167-68). The Husband supported his position by forwarding the full text of the decision of the California Court of Appeal in *Hisquierdo v. Hisquierdo,* 63 Cal. App.3d 230, 133 Cal.Rptr. 684 (1976). That decision determined that Federal law would be frustrated if a railroad worker were required to turn over an allocable share of his retirement benefits to an ex-spouse under a California community property award. (The entire text of the decision in that case was made part of the record. R. 170-173).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional provision:

Article VI, clause 2 (Supremacy Clause)

The principal federal statutes involved in this Appeal are the following:

10 US.C. § 1447 (3) (Survivor Benefit Plan)

10 U.S.C. § 3504(a) (Recall to Active Duty)

37 U.S.C. § 701(a) and (c) (Army pay anti-assignment clause)

42 U.S.C. § 402(b) (Social Security Act)

42 U.S.C. § 659(a) (Social Security Act)

42 U.S.C. § 662(c) (Social Security Act)

The principal state statutes are the following:

Cal. Civ. Code § 4803 (Quasi-Community Property)

Cal. Civ. Code § 5105 (Interests of Parties in Community Property)

Reference is made in this memorandum to other federal and state statutory provisions listed below. The principal statutes involved and all the following are reproduced in pertinent part in the appendix of statutory material.

Federal:

5 U.S.C. § 8345(j)(1) (Civil Service Retirement)

5 U.S.C. § 5532 (Dual Compensation Act)

10 U.S.C. § 227(a)

10 U.S.C. § 675 (Recall to Duty of Retired Reserve)

10 U.S.C. § 802(4) (Code of Military Justice)

10 U.S.C. § 886

10 U.S.C. § 1335(c) (Recall of Members on Inactive Status List)

10 U.S.C. § 1434 (Family Protection Act)

10 U.S.C. § 1440 (Assignment of Annuities)

10 U.S.C. § 1450 (Payment of FPP Annuities)

10 U.S.C. § 2771 (Accountability and Receivability)

10 U.S.C. § 3889 (Computation of Length of Service Retired Pay)

10 U.S.C. § 3911 (Retirement)

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10 U.S.C. § 3929 (Computation of Retired Pay)

10 U.S.C. § 6482

10 U.S.C. § 8504 (Recall of Retired Regular Air Force)

11 U.S.C. § 523(a)(5) (Bankruptcy Act, Exceptions to Discharge)

14 U.S.C. § 331 (Recall of Retired Coast Guard)

15 U.S.C. § 1673 (Consumer Credit Protection Act)

18 U.S.C. § 281 (Limitations on Retired Army)

22 U.S.C. § 1104 (Foreign Service Anti-Assignment)

31 U.S.C. § 203 (Anti-Assignment Act)

38 U.S.C. § 401(a) (Dependency and Indemnity Compensation)

41 U.S.C. § 15 (Anti-Assignment Act)

42 U.S.C. § 410(a)(6)(A)

42 U.S.C. § 410(l)(1)-(4)

State

Cal. Civ. Code § 4800(b)(1) (Division of Quasi-Community Property)

Cal. Civ. Code § 4801(a)(9) (Spousal Support Order)

Cal. Civ. Code § 4804

Cal. Civ. Code § 4806 (Awards from Separate Property)

Cal. Civ. Code § 5518 (Earnings as Separate Property)

Cal. Civ. Code § 5125 (Disposition of Community Property)

Cal. Civ. Code § 5150

Cal. Code of Civ. Procedure § 690.18 (Exemptions from Execution)

STATEMENT OF THE CASE

The Husband petitioned the Superior Court for the City and County of San Francisco for divorce on December 1, 1976. (J.A. 1). The Husband asked for custody of the three minor children of the marriage (J.A. 2); listed his assets (J.A. 17-29); and claimed to the Superior Court that "all military retired benefits" which he expected to receive were his separate property (J.A. 2) and hence not subject to division by the divorce court under California's community property regime (R. 115). The Wife responded, asking for dissolution of the marriage (J.A. 8); custody of the minor children and child support (J.A. 9); alimony of $1,000 per month (J.A. 15) and for a division of all community property funds including the Husband's contingent interest in his future military retirement pay (J.A. 8-9).

The parties were married on March 23, 1957 (J.A. 1), when the Husband was in his second year in medical school in Oregon (J.A. 32). In his fourth year in medical

school, the Husband went on active duty with the Army (J.A. 32). At the time the parties separated, the marriage had lasted 19 years, seven months (J.A. 40). The Husband had served 220 months of the 240 months (20 years) required for eligibility for receipt of Army retired pay (J.A. 33; R. 120).

At the time of the divorce petition, the Husband was an Army physician, with the rank of Colonel and had been stationed in San Francisco for two and one half years at the Presidio Military Reservation (J.A. 32).

Prior to his Army transfer to San Francisco, the Husband had been stationed in Texas for five years; in California for four years; in Hawaii for three years; in Washington, D.C., for two years; in Pennsylvania for one year; and in Oregon for one year. (J.A. 32).

The Superior Court awarded the Wife $500 alimony per month for support (J.A. 44); custody of the three minor children to the Husband, without requiring the Wife to make any child support contribution (J.A. 44); and divided the available cash and the value of two vehicles between the spouses (J.A. 45). The Court separately determined that the Husband's "retirement rights with the U.S. Army are to be divided as quasi-community property pursuant to Section 4803 of the Civil Code."[b] (J.A. 45) The formula to be applied was stated as follows:

> [P]etitioner shall pay to respondent, as long as she lives, that portion of his total monthly pension or retirement payment which equals one-half (½) of the

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[b]Section 4803 of Cal. Civ. Code (West Supp. 1980) defines "quasi-community property" as "all real or personal property, wherever situated, heretofore or hereafter acquired . . . [b]y either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition."

> ratio of the total time between marriage and separation during which petitioner was in the United States Army to the total number of years he has served with the United States Army at the time of retirement, and the Court retains jurisdiction to make such determination at that time and to supervise distribution thereof. (J.A. 45-46)

The Husband had objected to such division claiming the court lacked power to allocate to the Wife any portion of his expectancy in Army retired pay. He argued that he was an Oregon and not a California domiciliary, so that California could not apply quasi-community concepts to his Army retired pay. In any event, Army retired pay could not under Federal law be allocated to an ex-spouse.

The Husband appealed so much of the decision of the Superior Court as dealt with the division of Army retired pay. The parties thereafter stipulated that the Husband would pay that portion of the Army retired pay due him but allocable to the Wife under the order of the Superior Court into a trust account administered by counsel for both parties, pending the conclusion of all appeals (J.A. 47-48). The stipulation was confirmed by order of the Superior Court (J.A. 49-50).

Upon retirement, the Husband began receiving monthly retired pay of $1,507.86. The entitlement of the Husband has varied in amount by virtue of the application of the Dual Compensation Act, 5 U.S.C. §§ 5531 *et seq.*, and changes in the cost-of-living index to which Army retired pay is currently tied.

Before the Court of Appeal the Husband pressed the argument that § 4803 as applied to Army retired pay was repugnant to federal law, relying especially upon the decision of this Court in *Hisquierdo v. Hisquierdo,* 439 U.S.

572 (1979). Despite extensive briefing by the parties on the subject of federal preemption, the Court of Appeal, in affirming the decision below, devoted itself in its opinion and order primarily to other matters (J.S. 32-56). It disposed of the federal preemption issue in a brief discussion (J.S. 57-60), distinguishing *Hisquierdo* on the authority of *Gorman v. Gorman,* 90 Cal.App. 3d 454, 153 Cal.Rptr. 479 (1979), and resting its holding on *In re Marriage of Fithian*, 10 Cal.3d 592, 111 Cal.Rptr. 369 (1974), *cert. denied* 419 U.S. 829 (1974).

SUMMARY OF ARGUMENTS

Federal law bars California from applying its quasi-community property regime to Army retired pay. California's divorce court may not award an interest in the Husband's Army retired pay to his ex-spouse.

1. The Congress has established a comprehensive and detailed system for inducing young men to join and remain in the Army; and it has also enacted provisions designed to reduce the number of older, career Army men in service by forced attrition. The statutory system is carefully balanced to promote the realization of both sets of objectives. Interrelated programs provide benefits to the Army member, his spouse, his ex-spouse, and to his widow. Certain benefits to the ex-spouse and to the widow are structured through the Social Security System. A Survivor Benefit Plan 10 U.S.C. §§ 1447-1455, funded in part through tax revenues, provides an annuity to the widow. And Army retired pay, 10 U.S.C. §§ 3991-3992, is paid, again from public funds, to the former member as his "personal entitlement."

The Congress intended that this system of benefits operate in uniform fashion and on a national scale. The Congress did not intend that the serviceman, compelled to

serve at stations designated by the Army, would be subjected to the vagaries of local law in a manner which would deprive him of those benefits which the Congress had targeted him to receive.

2. Title 37 U.S.C. §§ 701(a) and (c), anti-assignment provisions, bar the anticipation of Army retired pay through state community property awards. This conclusion is strengthened by amendments to the Social Security Act, made applicable to members of the Armed Forces. 42 U.S.C. §§ 659(a) and 662(c). In these amendments, the United States has consented to be sued in garnishment proceedings to enforce support decrees issued by state courts. However, the Congress refused to extend this consent to permit garnishment of Army retired pay to satisfy community property awards.

The aggressive use of community property awards of military retired pay had been prompted by the inability of ex-spouses to enforce support awards. By applying property concepts to Army retired pay, the ex-spouse could have the state court determine a value for the retired pay expectancy of the Army spouse and take her share of that value from other assets belonging to the community.

By creating a mechanism in the Social Security Act amendments for enforcing support awards, the Congress undercut that rationale. The action of the Congress also represents a cautious approach towards the adoption, in the area of military retirement payments, of social policy preferences embraced by a minority—the community property—states.

3. The scheme of benefits designed by the Congress for the former member is inconsistent with the division of Army retired pay by California divorce courts. The scheme set forth in the Survivor Benefit Plan, 10 U.S.C. §§ 1447-1456, prefers the widow and ignores the ex-spouse. But in

practical application, the ex-spouse who collects an allocable portion of the Army retired pay of a former member, through a community property award, secures a more advantageous position for herself when compared with the widow.

The choice by the Congress to exclude the ex-spouse was deliberate; the Congress intended to prefer the widow, and it rejected benefits for the ex-spouse. In these circumstances, California divorce courts upset the balance of carefully measured federal benefits which the Congress has struck.

Legislative history associated with Army retired pay and with its adjunct programs, the annuity plans, supports the conclusion that the Congress has always considered Army retired pay to be a personal entitlement of the former member.

4. California divorce courts allow the ex-spouse to claim an equal interest in Army retired pay not as a creditor of the former member, but as a co-owner of the entitlement to the benefit. The ownership argument, however, proves too much. The Congress did not contemplate that an ex-spouse who predeceased the Army retiree should be able to pass on her entitlement to Army retired pay, as property, to her heirs. Nor did the Congress anticipate she might compel the army member to continue in active service, against his wishes, so as to protect her entitlement to retired pay; nor, that she might compel him to resign from the Army, when he does not wish to do so, after having completed his twenty-year service eligibility, so that she may secure her property interest immediately in the retired pay.

The ownership of the non-Army spouse in Army retired pay is non-existent until the Army sends the serviceman spouse to a community property state. That transfer alone suddenly enriches the non-Army spouse. The gain to her

property interests embraces not only future service time still required by the Army from the member to qualify for retired pay. If either spouse files for divorce in California, the application of § 4803 of the Civil Code, the quasi community property provision, will enrich the non-Army spouse with a state directed award for up to half the Army retired pay. All completed service time by the Army member served outside California will be treated by the California divorce courts as if it had been served in California. The possibility of such sudden enrichment of the spouse and correlative impoverishment of the Army member was not intended by the Congress.

5. The Congress established Army retired pay as compensation to the retired army members for remaining in the Army on a special basis, performing reduced services for reduced pay. The retired member remains subject to the Code of Military Justice, 10 U.S.C. § 802(4); and he remains vulnerable to recall to active duty at any time. 10 U.S.C. § 3504(a). His status is such that he earns his payment as wages, from day to day. His compensation is not a pension given as a gratuity; nor is it deferred compensation for past services. In this regard the situation of the former Army member differs from the retired federal civil servant and the member of the foreign service.

The relationship to the Army of the former member receiving retired pay is ignored by California divorce courts. California assumes it can characterize Army retired pay freely, as it chooses, believing that federal law places no constraint upon its right to do so. California chooses to characterize Army retired pay as deferred compensation paid to the former member for his past services to the Army. This characterization renders retired pay eligible, under California's community property concepts, for equal division between the spouses.

But California cannot apply its rules to determine the nature of retired pay. Because the retired pay is given for current services, the pay represents wages. As such, Army retired pay is not divisible under federal law; and even under California law, wages earned after divorce are separate property, rather than community, and therefore cannot be divided.

In the division of Army retired pay the clash between federal law and principles of community property law as applied by California divorce courts must be resolved by reference to the Supremacy Clause. California's insistence that it apply community property concepts to Army retired pay so as to confer benefits upon an ex-spouse must give way.

ARGUMENT

I

INTRODUCTORY MATTER

A. The Preemption Argument.

California's divorce courts applying community[1] or quasi-community property[2] principles allocate to the ex-spouse a portion of the expectancy which the Army ser-

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[1]The heart of California's community property scheme is §5105 of the Civil Code (West, Supp. 1980). It provides that "interests of the husband and wife in community property during continuance of the marriage relation are present, existing, and equal interests."

[2]The doctrine of quasi-community property is encompassed in its entirety in § 4803 of the California Civil Code (West, Supp. 1980). Civ. Code § 4800(b)(1) (West, Supp. 1980) allows the court to "award any asset to one party on such conditions as it deems proper to effect a substantially equal division of the property." Once property is classified as quasi-community property, it is treated as community property. *Cooper v. Cooper*, 269 Cal.App.2d 6, 74 Cal.Rptr. 439 (1969).

viceman spouse has in receiving future Army retired pay.[3] Such divisions of Army retired pay are repugnant to the federal statutes which relate to Army retired pay. The awards by the divorce courts of a portion of such pay to an ex-spouse do "major damage to clear and substantial federal interests," within the meaning and intendment of *Hisquierdo*, 439 U.S. at 581.

Hisquierdo provides guideline rules for analyzing the conflict between federal requirements and state community property allocations of federally-created retirement benefits.[4] *Hisquierdo* found that federal law conflicts with awards by California divorce courts of Railroad Retirement Act benefits; under the Supremacy Clause, state law in such circumstances must give way. The *Hisquierdo* analysis compels a similar result in this case with respect to the

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[3]The major California cases which have divided Army retired pay are *Fithian v. Fithian*, 10 Cal.3d 592, 111 Cal.Rptr. 369 (1974), *cert. denied*, 419 U.S. 829 (1974); *Gorman v. Gorman*, 90 Cal.App. 2d 454, 153 Cal.Rptr. 479 (1979). The most recent exposition of the views of the California Supreme Court on the subject of division of military retired pay benefits appears in *In re Marriage of Milhan*, 27 Cal.3d 765, 166 Cal.Rptr. 533 (1980), which concerned the division of Navy retired pay. That decision appeared after the Jurisdictional Statement in this appeal had already been filed. *See also In re Marriage of Milhan*, 13 Cal.3d 129, 117 Cal.Rptr. 809, 529 P.2d 1145 (1974), *cert. denied*, 421 U.S. 975 (1975).

[4]In *Hisquierdo*, the elements singled out for special concern were an anti-assignment statute, 45 U.S.C. § 231m, which ensured that Railroad Retirement Act benefits reach the entitled worker; a statutory scheme funded in large part by public funds, rather than contributions by employer and employee; and a separate spousal benefit. Beyond the technical elements, the *Hisquierdo* court considered the federal need for uniformity of result in assuring benefits to the targeted individual, 439 U.S. at 584; and, in the ultimate sense, whether the "flow of incentives" which the Congress had established in the Act to realize its objectives would be impeded by a community property award to an ex-spouse. 439 U.S. at 585.

divorce court award to the Wife of an expectancy in the Husband's Army retired pay.

It is not possible to harmonize California's community property scheme with the federal system for Army retired pay.[5] Under California's community property system, an equal division between husband and wife is made at the time of divorce of all property acquired during the marriage. This division is made purely on the basis of ownership, without regard to the needs of either spouse.[6]

The federal scheme for Army retired pay is entirely a creation of the Congress. There is no contractual element whatever associated with Army retired pay, and the serviceman makes no contribution to any fund as a condition for receiving retired pay.

The Congressional scheme is concerned with the creation of a strong Army. Through various incentives, including retired pay, the Congress seeks to attract young and vigorous youth to the Army; to encourage or compel older members to retire from active service; and to retain retired members on a standby basis for recall to active service as long as their physical condition will permit.

The elements of the federal statutory scheme which individually and together support a conclusion of federal pre-emption include the following:

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[5]This Court has on five previous occasions found federal pre-emption of state community property laws which in their application were repugnant to federal statutes. In addition to the decision in *Hisquierdo*, the Court did not permit community property concepts to apply in *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964); *Free v. Bland*, 369 U.S. 663 (1962); *Wissner v. Wissner*, 338 U.S. 655 (1949); and *McCune v. Essig*, 199 U.S. 382 (1905).

[6](West, Supp. 1980).

(1) Strong anti-assignment provisions which insure that Army retired pay will actually be received by the former Army member.

(2) A mandatory recall status for Army personnel receiving retired pay which insures that at any time the President can recall the former member to active duty. The retired Army officer remains in the Army, on special terms, receiving current pay on a reduced basis for reduced services.

(3) A carefully balanced system of mandatory (i.e., social security) and voluntary (i.e., annuity plan) benefits for the former member receiving Army retired pay, for his spouse, ex-spouse, and widow.

(4) A recognition by the Congress of the right of an ex-spouse or dependent child to invade Army retired pay for support according to need; and a refusal to recognize the claim of an ex-spouse to a property interest in such pay.

B. Army Retired Pay.

Army retired pay can be traced at least as far back as Civil War days.[7] For members of regular Army components, the current system distinguishes between retirement for age, 10 U.S.C. §§ 3883-3889, and retirement for length of service, 10 U.S.C. §§ 3911-3929. With respect to both categories, the member is "entitled to retired pay

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[7] *Preliminary Review of Military Retirement Systems: Hearings Before the Military Compensation Subcommittee of the House Armed Services Committee*, 95th Cong., 1st and 2d Sess. 5 (1977-1978) (statement of Col. Leon S. Hirsch, Jr.). Pensions, which are gratuities, differ from retired pay. They were given earlier to veterans of the Revolutionary War. *Walton v. Cotton*, 60 U.S. 355 (1857).

computed under Chapter 371 of this Title" (10 U.S.C. §§ 3991-3992).[8]

With respect to length of service, 10 U.S.C. § 3914 allows an enlisted man who has at least 20 but fewer than 30 years of service to be retired upon his request. If his request is granted, he becomes a member of the Army Reserve, and in that capacity "shall perform such active duty as may be prescribed under law" until his combined service equals 30 years. Under 10 U.S.C. § 3911, an Army officer may request to be retired after 20 years of service.

The incentive of a 20-year retirement program is designed to induce the youth of the country to join the Army and to remain for extended service. But there are disincentives for an officer remaining in the Army after 20 years. An officer who is passed over for promotion, if he has at least 20 years of service, must be retired. 10 U.S.C. § 3913. Under 10 U.S.C. § 3915, members of the Women's Army Corps must retire after completion of 25 years of service. For other categories there are differing mandatory retirement rules.[9]

These provisions operate to make room at the upper levels of the Army for the younger men who are rising in rank and to clear out the older soldiers by forced attrition, thereby ensuring a pyramid structure in which most of the Army consists of younger men. Thus, the Congress has created a system of balanced incentives: an inducement to younger men to stay in the active service of the Army for

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[8]An Army member may also be retired for physical disability, 10 U.S.C. §§ 1201-1221. Retired pay for service in nonregular components of the Army is covered by 10 U.S.C. §§ 1331-1337.

[9]E.g., a promotion list officer in the regular grade of lieutenant-colonel must be retired after he completes 28 years of service. 10 U.S.C. § 3916. The period is extended to 30 years or 5 years in grade for colonels, 10 U.S.C. § 3921; and 35 years for brigadier and major generals. 10 U.S.C. §§ 3922 and 3923.

20 years, and a system of voluntary inducements and mandatory limitations designed to curtail active duty and place members on the retired list.

A principal feature associated with Army retired status concerns recall to active duty. Under 10 U.S.C. § 3504(a), the President "may order any retired member of the regular Army to active duty . . . in the interests of national defense."[10]

The vulnerability to recall distinguishes Army retired pay from a true pension.[11]

Army retired personnel are still officers in the Army of The United States.[12] They remain subject to the Code of

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[10]A parallel provision appears at 10 U.S.C. § 1335(c) for retirees from the Army Reserve. Separate provisions allow the President to recall to active duty retired members of regular components of the Navy and Marines, 10 U.S.C. § 6482, and the Air Force, 10 U.S.C. § 8504.

[11]From *Lemly v. United States*, 75 F.Supp. 248, 249 (Ct.Cl. 1948):

> [W]hen a pension is paid someone, he is considered all through, his services are over, and he is pensioned "off." Furthermore, a pension is paid after the service has been performed without any regard to the actual performance of service as a gratuitous recognition of a moral or honorary obligation of the government. When a person is pensioned "off" by the government, that government no longer has any control over his services. He is actually all through serving the government and yet he receives his pension as long as he lives.
>
> Retirement pay, on the other hand, is a continuation of active pay on a reduced basis. Even though an officer is retired from active duty and is receiving retirement pay, he is still subject to call to active duty as long as his physical condition will permit. He is still an officer in the service of his country even though on the retired list.

[12]*Kahn v. Anderson*, 255 U.S. 5, 6-7 (1920); *Puglisi v. United States*, 564 F.2d 403 (Ct. Cl. 1977), *cert. denied*, 435 U.S. 968 (1978).

Military Justice.[13] They sit as officers on court-martial tribunals.[14] They may lose part of their retired pay if they take a Federal Civil Service job,[15] or all of it if they give up U.S. citizenship;[16] take on employment by a foreign government;[17] or perform certain proscribed activities during their retired status.[18]

Although the Army member makes no contribution from active duty pay toward receipt of future retired pay, since 1957 he has been required to make Social Security contributions out of his active duty pay. 42 U.S.C. § 410(l) (1)-(4). Upon reaching the necessary age qualifications, the Army retiree, his spouse, his ex-spouse, and dependent children are entitled to payments from Social Security.[19] If the serviceman does not complete his 20 years and does not become entitled to Army retired pay, both he and his spouse may find themselves only with Social Security benefits.[20]

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[13]10 U.S.C. § 802 (4).

[14]*Hooper v. Hartman,* 153 F.Supp. 437, 442 (S.D. Cal. 1958), aff'd, 274 F.2d 429 (9th Cir. 1959).

[15]5 U.S.C. §§ 5531, *et seq.*

[16]58 Comp.Gen. 566 (1979).

[17]U.S. Const. art. I, § 9, cl. 8; *Watson v. Watson,* 424 F.Supp. 866, 869, (E.D.N.C. 1976).

[18]*Chambers v. Russell,* 192 F.Supp. 425, 427 (N.D. Cal. 1961). *See also* 18 U.S.C. § 281 (a retired officer may not sell to the United States through a department in whose service he holds a retired status); 37 U.S.C. § 801(c) (no retired pay to one who sells supplies to the military).

[19]42 U.S.C. § 402(a) spells out the former member's benefits; § 402(b), those of his spouse and ex-spouse. Section 402(b)(3) requires that the ex-spouse must have been married to the former member at least ten years.

[20]In this regard, the serviceman differs from members of the Federal Civil Service and the Foreign Service. In neither of these two cases does the member make any contributions to the Social Security system or receive Social Security benefits. 42 U.S.C. § 410(a)(6)(A).

The spouse and the ex-spouse both become entitled to benefits solely on the basis of the serviceman's contributions. 42 U.S.C. § 402(b).

A second adjunct program to Army retired pay is the Survivor Benefit Plan, 10 U.S.C. §§ 1447-1455, successor to the earlier Retired Serviceman's Family Protection Plan, 10 U.S.C. §§ 1431-1446.[21] The plans are voluntary in nature. They allow an Army retired member to make deductions from his retired pay to support an annuity payable to his widow or children upon his death. In its current form, the retiree must turn down participation in the plan in order to avoid deductions from retired pay. 10 U.S.C. § 1448(a)(3)(A) (Supp. 1980). There is a statutory inducement from him not to waive participation in the plan. 10 U.S.C. § 1452 (Supp. 1980).

If Social Security benefits are paid to the widow, the amount of the annuity she is eligible to receive is reduced. 10 U.S.C. § 1451(a). Payment of the maximum annuity allowed will exclude all Sociay Security payments to the widow. But Social Security payments to the ex-spouse are not affected by the annuity payment to the widow, and the annuity payment to the widow is not reduced by Social Security payments to the ex-spouse. The annuity program is funded only in part through deductions from Army retired pay; a large proportion is funded through annual federal appropriations.[21.1]

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[21]The earlier plan is still in force for participants who chose to remain in it. 10 U.S.C. §§ 1431(b).

[21.1]*In re Marriage of Karlin*, 24 Cal.App.3d 25, 101 Cal.Rptr. 240 (1972); S.Rep. No. 1089, 92nd Cong., 2d Sess. 11 (1972); H.R. Rep. No. 481, 92nd Cong., 1st Sess. 8 (1971).

C. California Community Property Awards of Army Retired Pay to an Ex-Spouse.

The zeal with which California courts have attacked pension rights with community property weaponry is a fairly recent phenomenon. The forced development in this area has been undertaken by the California courts rather than by the legislature.[22] Statutory language which protected state created retirement benefits from claims of creditors was held no bar to the community property claim asserted by an ex-spouse as an owner.[23]

Early attacks on military retired pay as a form of allocable community property foundered on the concept of vested rights. Because the military benefits were not vested in a serviceman whose claim to retired pay had not yet matured, an early decision held that Army retired pay could not be allocated to an ex-spouse. *French v. French,* 17 Cal.2d 775, 112 P.2d 235 (1941). Subsequent decisions altered the theory of the matter. The right to retired pay was held to be a contingent property right subject to defeasance in the event the serviceman failed to complete the minimum service period. *Fithian v. Fithian,* 10 Cal.3d 592, 111 Cal.Rptr. 369 (1974), *cert. denied,* 419 U.S. 829 (1974).

The aggressive extension of community property concepts to the entire area of retirement benefits has been explained in terms of "the desire to give the former wife

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[22]*Benson v. City of Los Angeles,* 60 Cal.2d 355, 33 Cal.Rptr. 257 (1963); *Waite v. Waite,* 6 Cal.3d 461, 99 Cal.Rptr. 325 (1972); *Bensing v. Bensing,* 25 Cal.App.3d 889, 102 Cal.Rptr. 255 (1972); *In re Marriage of Brown,* 27 Cal.App.3d 188, 103 Cal.Rptr. 510 (1972); *Fithian v. Fithian,* 10 Cal.3d 592, 111 Cal.Rptr. 369 (1974).

[23]See, *Phillipson v. Board of Administration,* 3 Cal.3d 32, 40 Cal. Rptr. 61 (1970) (bypassing Cal. Gov't Code §§ 21201, 21201.5).

some support."[24] Until 1975, the retirement income of any public servant (state or federal) could not be reached by execution to enforce a support award. Such retirement benefits were exempted from execution by state law.[25] The exemption statute would not permit support payments to be garnisheed.[26] In an end run, the courts "bypassed the exemption from execution by declaring the property as community and that the ex-wife is not a 'creditor' but an 'owner' reclaiming her own property."[27]

This approach required that the retirement funds of the public servant be characterized as deferred compensation for completed services. If the retired pay represented current wages for current services, community property principles, would provide no aid.[28]

In 1975, the state legislature excepted support orders from the exemption of retirement funds from execution.[29] At the same time, in the Social Services Amendments of 1974, the Congress consented to suits against the United States to enforce state support awards. 42 U.S.C. § 659(a). The new federal enactment covered "members of the

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[24]Goldberg, *"Is Armed Services Retired Pay Really Community Property?"* 48 Cal. State Bar J. 12, 89-90 (1973).

[25]Cal. Civ. Proc. Code § 690.18(a) (West, Supp. 1975); *Phillipson v. Board of Administration*, 3 Cal.3d 32, 40 Cal.Rptr. 61 (1970).

[26]*Ogle v. Heim*, 69 Cal.2d 7, 69 Cal.Rptr. 579 (1968).

[27]*Waite v. Waite*, 6 Cal.3d 461, 474, 99 Cal.Rptr. 325 (1972); *Phillipson v. Board of Administration*, 3 Cal.3d 32, 50, 40 Cal.Rptr. 61 (1970); *Wissner v. Wissner*, 338 U.S. 655, 660, n.4 (1949); Goldberg, *supra*, note 24.

[28]Wages are the separate property of the retiree after divorce. Separate property cannot be apportioned. Cal. Civ. Code §§ 4800, 5118, 5119 (West. Supp. 1980).

[29]Cal. Civ. Proc. Code § 690.18(a), as amended by 1975 Cal. Stats. 1035, ch. 590, § 2 (adding phrase, "Except with regard to court-ordered child or spousal support payments . . .").

armed services." A later, clarifying amendment in the Tax Reduction and Simplification Act of 1977, which appeared as 42 U.S.C. § 662(c), stated that the consent was limited to support payments. Property awards were expressly excluded.

As a result of these extraordinary changes[30] in state and federal law, the cause which prompted an assault by California courts on retirement benefits for public service employees lost its urgency. At present, support orders can easily be enforced against the United States; community property awards cannot.[31] But the doctrinal genie has been let loose; having established the theoretical basis for allocating retired Army pay, the state courts cannot now put the genie back in the bottle.[32]

With the initiative coming from the community property states, Congress in 1978 amended legislation governing the retirement program for the Federal Civil Service; it modified anti-assignment and sovereign immunity restrictions to allow garnishment of benefits to enforce community property awards.[33] More recently, similar action was taken to amend the retirement program affecting the Foreign Ser-

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[30]In a prior, unsuccessful legislative effort to bring about such changes, a House Committee observed that the proposal represented "a drastic departure from anything we have had in the past." H.R. Rep. No. 481, 92nd Cong., 1st Sess. 18 (1971).

[31]57 Comp.Gen. 420 (1978); 44 Comp.Gen. 86 (1964); *Marin v. Hatfield,* 546 F.2d 1230 (5th Cir. 1977). The ex-spouse need not chase down the retiree in another state or seek a contempt order. She need only bring a garnishment action against the appropriate agency's financial officer in state court.

[32]The implications of dealing with Army retired pay as divisible community property are only slowly emerging. California courts have not yet dealt squarely with these implications. See pp. 31-35, *infra.*

[33]5 U.S.C. § 8345(j)(1).

vice.[34] But a bill which would have modified legislation governing military retirement benefits by giving effect to state community property awards died in committee.[35]

II

BY MEANS OF ANTI-ASSIGNMENT STATUTES APPLICABLE TO ARMY RETIRED PAY, THE CONGRESS INTENDED THAT RETIRED PAY NOT BE DIVERTED FROM THE ENTITLED MEMBER

A. The Congress Enacted 37 U.S.C. §§ 701(a) and (c) to Protect Army Retired Pay.

Army pay anti-assignment statutes are of venerable age. Title 37 U.S.C. § 701(c) is traceable to an enactment in 1972. In its current formulation, the statute provides that "an enlisted member of the Army . . . may not assign his pay, and if he does so, the assignment is void.[36] Under § 701(c) "a commissioned officer of the Army . . . may transfer or assign his pay account, when due and payable"; but he may do so only "under regulations prescribed by the Secretary of the Army." Regulations contemporaneous with the enactment of § 701(a) limit the assignment of

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[34]Foreign Service Act of 1980, September 29, 1980, Pub. L. No. 96-465, § 820(b), ... Stat. ... (1980) (to be known as 22 U.S.C. § 1104).

[35]Hearings were held in May 1980 before the House Armed Services Committee on H.R. 2817. In testimony before the Committee Rep. Schroeder, sponsor of the bill, stated with respect to military pay: "Under current law a divorced spouse is prohibited from receipt of retirement or survivor's benefits. . .". Statement submitted on May 28, 1980. (The text of the Hearings are shortly to be published. A copy of the statement presented to the Committee is available at present from the office of Rep. Schroeder.)

[36]The original 1792 statute, enacted May 8, 1792, ch. 37, § 4, 1 Stat. 280, provides "[t]hat no assignment of pay made after the first day of June next, by a noncommissioned officer or private, shall be valid."

pay by a commissioned officer, when due and payable, to members of his "family."[37]

Although §§ 701(a) and (c) refer only to "pay," the sections apply to both active and retired Army pay.[38]

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[37]The predecessor to § 701(a) appeared in the Act of March 2, 1907, ch. 2511, 34 Stat. 1159. That Act stated in a proviso, "[t]hat hereafter all commissioned officers of the Army may transfer or assign their pay accounts, when due and payable, under such regulations and restrictions as the Secretary of War may prescribe." Prior to this enactment, the matter was governed only by Army regulations. See, Act of April 23, 1904, ch. 1485, 33 Stat. 266. The regulations referred to in the 1907 legislation appear as Article LXXVI in *Regulations for the Army of the United States* (Washington, Government Printing Office, 1908), published under authority of the Secretary of War, and distributed to all officers by the Paymaster General. Section 1277, which appears at page 217, states in pertinent part:

> An officer may forward his pay account to a paymaster before maturity, the amount to be remitted to the officer when due, or placed to his credit with a bank if the account is still endorsed, but an officer will not hypothecate or transfer an account not actually due. * * * A transferred account will not be paid outside the department in which the officer is regularly paid except when it is transferred for the benefit of his family residing in another department,
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> . . .

[38]Section 1-17 of Army Regulation No. 37-104-1, issued by Headquarters, Department of the Army, Washington, D.C., July 1, 1977, and pertaining to "financial administration, payment of retired pay to members and former members of the Army", provides:

> "(a) *Commissioned Officers*—A retired officer may transfer or assign retired pay when due and payable. (37 U.S.C. § 701(a)).
>
> "(b) *Enlisted Members*—An enlisted member is not authorized to assign retired pay and, if done, the assignment is void. (37 U.S.C. § 701(c))."

Section 701 must apply to retired pay, since historically Army retired pay was viewed as pay for the current year—payment in reduced amount for reduced services. *United States v. Tyler*, 105

B. Sections 701(a) and (c) Promote Important Federal Objectives.

The Congress has sought to protect both the enlisted man and the commissioned officer from their own follies and from the depredations and claims of others. In § 701(c), the Congress ensured that the enlisted man would not become demoralized, because he was expected to work and fight without pay. By making his assignments "void", the prohibition permits no quibbling.

The limitations placed by § 701(a) on the right of an Army commissioned officer to assign his pay are no less rigorous. "When due and payable" is simply an alternative phrasing for the prohibition against "anticipation" considered in *Hisquierdo*.[39]

Sections 701(a) and (c) derive from settled rules based upon public policy considerations: an assignment by a public officer of the unearned salary of his office is void. *Fisher v. Liberty National Bank & Trust Co.*, 61 F.2d 757, 758

U.S. 244 (1881). Currently, "[t]he officers of the United States who are entrusted with the administration of pay and allowances for the United States Army consider retirement pay and active duty pay to be the same, and that they are identical and to be considered the same." *Watson v. Watson*, 424 F.Supp. 866, 869 (E.D.N.C. 1976). Army retired pay had traditionally been tied directly to active duty pay by a formula that adjusted retired pay as active duty pay rose or fell. *Costello v. United States*, 587 F.2d 424 (9th Cir. 1978), *cert. denied* 442 U.S. 929 (1979). After 1963, this linkage was broken, and Army retired pay was tied to a cost-of-living index. Because of these characteristics associated with Army retired pay, there was no need for the Congress to have adopted two anti-assignment statutes, one for active-duty pay and another for Army retired pay.

[39] *United States v. Smith*, 393 F.2d 318, 321 (5th Cir. 1968); *Smith v. Commanding Officer, Air Force Accounting*, 552 F.2d 234, 235 (9th Cir. 1979); *In re Marriage of Ellis*, 36 Colo. App. 234, 538 P.2d 1347 (1975), *aff'd* 191 Colo. 317, 552 P.2d 506 (1976).

(2d Cir. 1932), *cert. denied sub nom. Barker v. Fisher*, 288 U.S. 611 (1933).[40]

Anti-assignment statutes serve the need for uniformity in the treatment of retired pay.[41] The railroad man in *Hisquierdo* and the federal civil servant both have a choice where to live. Both *choose* to live in California. But the Army man on active duty will be *ordered* to California. The Army cannot send its soldiers and officers to California under threat of compulsion[42] without insulating them from the inroads of local divorce courts that promote local public policy concerns at the expense of the servicemens' future retired pay.[43]

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[40]"By an assignment of his future pay a public officer strips himself of further inducement to perform his services and thus chills his efforts." 61 F.2d at 759. This rule applies to the pay of an Army officer; and it applies of its own force without need for an express statutory prohibition. *United States v. Phillips*, 5 App.D.C. 385, 389 (1895). Cf., *Lockhart v. Mittleman*, 123 F.2d 703, 704 (2d Cir. 1942).

[41]"Section 231m plays a most important role in the statutory scheme. Like anti-attachment provisions generally [citations omitted], it ensures that the benefits actually reach the beneficiary. It preempts all state law that stands in its way. * * * It prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of Congressional policy." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 583-84.

[42]If he "fails to go to his appointed place of duty" he "shall be punished." 10 U.S.C. § 886.

[43]The Husband in this case performed duty in Oregon, Washington, D.C., Texas, Hawaii, and Pennsylvania (J.A. 32) without anticipating that the Army might send him in the future to California. In California, the Husband found himself before a divorce court that did not limit itself to dividing that portion of his retired pay attributable at time spent in an Army base in California. The court concerned itself with the Husband's entire 20-year service period as the basis for its award. *Cf., Fithian v. Fithian*, 10 Cal.3d

The serviceman with significant credit time towards Army retired pay should fear a move to California. If his service credit was acquired outside community property states, his expectation of receiving retired pay, at a decent level which may allow him freedom from penury, may not be realized.[44]

The non-army spouse contemplating divorce is immediately benefited by moving to California from a non-community property state. Relocation by the Army immediately invests the non-Army spouse with a right to a significant asset that she never had before. This uncertainty on the part of Army members—whether a divorce court will strip them of their right to retired pay—serves

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592, 111 Cal.Rptr. 359 (1974); *In re Anderson*, 64 Cal.App.3d 36, 134 Cal.Rptr. 252 (1976). Domicile considerations do not deter the California courts. Merely filing for divorce in California was deemed sufficient for the Husband to have waived any defense he may have had based upon his claimed Oregon domicile. J.S. 52-54. But the Husband had no choice: he had to file in California to secure custody of his minor children in California.

[44]Because the ex-spouse claims her share as an owner, the divorce court does not take into account limitations on sums which may be garnisheed as wages. Neither state limitations on the garnishment of wages, nor limitations set forth in the Consumer Credit Protection Act, 15 U.S.C. § 1673(b) (as implemented in regulations appearing in 5 C.F.R. Part 581) apply to an ex-spouse claiming her "property" in Army retired pay. Moreover, the former member must pay income tax on the entire sum of his retired pay; if the portion which he pays to the ex-spouse is her "property," he has no alimony deductions.

If the former member participates in the Survivor Benefit Plan (to assure the college education of his children or to provide for a surviving second spouse), his contributions to the Plan reduce only *his* portion of the retired pay. If he keeps the children, as here (J.A. 44), but does not secure a support award in his favor, the ex-spouse's share in retired pay is not diminished. If he must also, as here (J.A. 44), make support payments to the ex-spouse, such payments will again come out of his share of Army retired pay.

as a disincentive to join the Army or to remain in it. The flow of incentives which the Congress built into the system is thus significantly impaired by state community property initiatives in the context of divorce.[44.1]

C. The Congress Did Not Intend That §§ 701(a) and (c) Be Understood as Mere Expressions of Sovereign Immunity Against Suit in Garnishment Proceedings.

Hisquierdo reaffirmed "the settled view that anti-assignment statutes have substantive meaning." 439 U.S. 572, 586. It is significant, the court noted, that the statute makes no exception for a spouse.

Sections 701(a) and (c) reach beyond the sovereign immunity concerns of the United States. The early origins of 701(c) predates any statutory expression of sovereign immunity, such as that found at 31 U.S.C. § 203 or 41 U.S.C. § 15. The 1907 formulation of § 701(c) long post-dates the holding by this Court that Army retired pay cannot be garnisheed.[45]

The Congress has more recently adopted a strong anti-assignment provision for the Survivor Benefit Plan, 10 U.S.C. § 1440. There would be no need for separate anti-assignment restrictions for each category of Army retirement benefits if the only purpose of such legislation was to protect the Government against the inconveniences of

[44.1] To be sure, some jobs in the Army may be pursued on the basis of applications made for them by military personnel. The element of forum shopping will become paramount, however, to Army members aware of the risk to their retired pay associated with state community property laws. California will definitely be less attractive to a soldier than a common-law state if the serviceman fears that by transferring to California he endangers his retired pay.

The non-member spouse, contemplating divorce will surely forum-shop for a transfer to a community property state so as to claim her property interest in her husband's retired pay.

[45] *Alexander v. Buchanan*, 45 U.S. (1 How.) 20 (1846).

garnishment. The sovereign immunity of the United States from suit without its consent requires no anti-assignment provision to preserve its vitality.

Post-*Hisquierdo* California decisions dealing with military retired pay have drawn subtle distinctions among anti-assignment statutes.[46] But it is not the wording of any retired pay anti-assignment statute that has concerned the California courts.[47] In a candid admission, the State high court explained that in considering the scope of anti-assignment statutes it was bound by community property concerns.[48] This Court, however, is not similarly burdened.

California courts overcome all statutory construction difficulties posed by anti-assignment limitations. They simply apply California, rather than federal, characterizations of the nature of the right created by the Congress; they apply state ownership principles to the federal retirement benefit; and they demean the anti-assignment provisions which attend the federal benefit as mere expressions of sovereign immunity.

There is no basis for so emasculating § 701.

D. Sections 701(a) and (c) Do Not Allow California to Apply Its Community Property Principles to Award an Ex-Spouse an Allocable Share in Army Retired Pay.

The attempt by the wife to by-pass § 701 by reference to her property rights in the Husband's Army retired pay

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[46]*Gorman v. Gorman*, 90 Cal.App.3d 454, 153 Cal.Rptr. 479 (1979); *In re Marriage of Milhan*, 27 Cal.3d 765, 166 Cal.Rptr. 533 (1980).

[47]In *Hisquierdo* the California Supreme Court was not impeded by the bar against anticipation. *In Re Marriage of Hisquierdo*, 19 Cal.3d 613, 139 Cal.Rptr. 590 (1977).

[48]*Phillipson v. Board of Administration*, 3 Cal.3d 32, 68 n.10 and 69 n.12, 89 Cal.Rptr. 61 (1970).

proves too much. If the Wife has a true property interest, the implications exceed by far the issues involved in this case. An explanation of these implications serves to discredit the ownership argument:

(1) If the Wife is an owner of a property interest in Army retired pay she has as much of an entitlement to retired pay, for as long as *she* lives, as the Husband has for as long as *he* lives. Ownership by the Wife implies that the Army must pay her retired pay, for her efforts in the partnership venture by which the Husband, as the representative of the community, completed the requisite service period.[49] To be sure, the Survivor's Benefit Plan, 10 U.S.C. §§ 1447-1455, which provides for an annuity to a surviving spouse, would become redundant if a spouse could also collect retired pay, as a matter of her own property right, for as long as she lives.

(2) As a part owner of Army retired pay, the ex-spouse should be able to prevent the Army member from making decisions which would damage her ownership rights.[50] If after 19 years of service the Army member wishes to resign from the service, his resignation will affect the property interest of his ex-spouse in his retired pay. The resignation will, in fact, destroy it. Continued service by an Army member after the 20-year term also affects an ex-

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[49]The fiscal impact associated with acceptance of this doctrine would be substantial. Military retirement benefits account for half of total military personnel costs. *House Armed Services Committee Rep. No. 95-85. Preliminary Review of Military Retirement Systems: Hearings Before the Military Compensation Subcommittee of the House Armed Services Committee*, 95th Cong., 1st & 2d Sess. 5 (1977-1978).

[50]Under § 5125(b) of the Cal. Civ. Code, neither member of the community may "dispose of community personal property without a valuable consideration, without the written consent of the other spouse."

spouse's property interest. As long as the member continues in the Army, there are no monthly retired pay checks current to divide. There are only checks for office wages.

To defend destruction of her interest, the ex-spouse should be entitled—as in any analogous property preservation dispute—to enjoin the Army member from resigning prior to his completion of the 20-year period for eligibility; in the alternative, she should be able to secure damages from the Army member if he willfully chooses to resign from the Army prior to completing the 20-year service period.[51]

It would certainly be anomalous to have California courts intervene in this manner in the operation of the personnel system of the Army.[52]

(3) If Army retired pay is property, the ex-spouse who pre-deceases the retired member should be able to transfer her property by testamentary disposition. After all, all other property which an ex-spouse acquires by way of division of community property at the time of divorce can be freely disposed of by her, without limitation. California courts achieve this result routinely when the ex-spouse takes her share in the husband's retired pay from unrelated community property. If the Army member then fails to live out his expected lifespan, the ex-spouse is that much better off for having taken offsetting tangible property.

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[51]The same argument applies with respect to the Army spouse or ex-spouse who refuses to resign from the Army after 20 years. The non-Army spouse or ex-spouse should be able under state law to compel him to resign so that she can enjoy her property interest.

[52]The point can be expanded to include creditors' rights. If the wife pledges her property interest in the husband's Army retired pay, she may default and the lender, a financial institution, will acquire her property interest in the Army member's retired pay entitlement. The creditor then should have the same rights as the ex-spouse to force the Army member to resign or not to resign.

If there is no offsetting tangible community property, California courts restrict the ex-spouse from disposing of her share of the retired pay by testamentary disposition. But because the justification for the restriction so lacks adequate legal support, either the restrictions or the application of property concepts to Army retired pay must give way.[53]

The image of the former member hardly getting by, while the heirs (or creditors) of his ex-spouse draw half his retired pay shows the absurdity of applying community property principles to Army retired pay.[54]

(4) Community property awards of Army retired pay propel Army retirees to take advantage of the federal bankruptcy law. If the retired pay benefits are actuarially valued and the ex-spouse awarded an offsetting sum, she

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[53]*Waite v. Waite*, 6 Cal.3d 461, 99 Cal.Rptr. 325 (1972) held that the California legislature had intended to limit an ex-spouse's interest in the state-created pension of her husband to the duration of her lifetime, even if she predeceased him. That decision was then extended in *Fithian v. Fithian*, 10 Cal.3d 592, 111 Cal.Rptr. 369 (1974), *cert. denied* 419 U.S. 829 (1974), *without analysis*, to Army retired pay. Although the Congress can preempt California's application of its community property regime to Army retired pay, it cannot create a new species of property under hitherto unknown state law.

In the present case the Wife's interest in husband's retired pay is to last "as long as she lives." (J.A. 45). But so flawed is the reasoning supporting such a limitation that the courts or the legislature may seek to change the rule. Reppy, *Community and Separate Interests in Pensions and Social Security Benefits After* Marriage of Brown *and ERISA*, 25 U.C.L.A. L.Rev. 417, 443-482 (1978).

[54]"It certainly mongrelizes recognized property law concepts to say that upon her death that property right terminates in order to avoid a result which would point up the obvious inconsistencies with the congressional intent in establishing military retirement pay." *Ramsey v. Ramsey*, 96 Idaho 672, 684, 535 P.2d 53, 65 (1975) (dissent).

may well take all the tangible property available.[55] The former member may end up marching from the divorce court straight to the federal courthouse. The Bankruptcy Act at 11 U.S.C. § 523(a)(5) does not acknowledge a special status for a spouse claiming as a community property owner. An ex-spouse, armed with a community property award, is a creditor within the meaning of the Act.[56] A uniform system of dealing with Army retired pay, consistent with the national objective of promoting a strong military cannot be realized if Army personnel must resort to bankruptcy for relief from community property awards depriving them of Army retired pay.

E. Legislative history supports the conclusion that Congress intended that Army retired pay not be diverted from the former member

The statutory and legislative materials provide no indication that the Congress intended to allow enforcement of state community property awards against Army retired pay.

The Social Security Act amendments of 1975 and 1977 (42 U.S.C. §§ 659 and 662(c)) point to an opposite result. The specific changes affecting the Civil Service and the Foreign Service,[56.1] show a careful selection by the Congress of the objects of its attention. If express amendments to

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[55]In Idaho, if there is inadequate tangible property, the former member will be required to buy out the interest of his ex-spouse in his retired pay within a specified period and with his future earnings. *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975).

[56]Her claim is exempt from discharge if she is pursuing a support award. *Norris v. Norris*, 324 F.2d 826 (9th Cir. 1963). She is an ordinary creditor if she is pursuing recovery of a community property award. *Jones v. Tyson*, 518 F.2d 678 (9th Cir. 1975).

[56.1](5 USC 8345 (j)(1) (Supp. 1980); Foreign Service Act of 1950, September 29, 1980, Pub. L. No. 96-465, § 820(b), .. Stat. .. (1980) to be collated as 22 USC § 1104).

these two retirement programs were necessary to subject two kinds of federal retirement programs to the vagaries of community property awards, an express statutory amendment must also be necessary to bring about the same result for Army retired pay. This is especially so in light of §§ 701(a) and (c).

A Senate Committee has described retired pay as a "personal entitlement" of the former member.[57] In considering the balance between retired pay and the annuity programs, funded in part by deductions from retired pay, a House Committee noted that "[t]he rights in retirement pay accrue to the retiree and, ultimately, the decision is his as to whether or not to leave part of this retirement as an annuity to his survivors".[58]

The legislative history directly discussing Army retired pay is sparse. However, "[o]ne searches the statutes in vain for any indication that Congress has ever treated retired pay as property or has intended retired pay to be divisible upon divorce." *Cose v. Cose*, 582 P.2d 1230, 1232 (Alaska 1979), *Cert. petition docketed,* 48 U.S.L.W. 3627 (Alaska 1980).

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[57]"Historically, military retired pay has been a personal entitlement payable to the member himself as long as he lives." S.Rep. No. 1480, 90th Cong., 2d Sess. (1968), *reprinted in* [1968] U.S. Code Cong. & Ad. News 3294, 3300.

[58]H.R.Rep. No. 481, 92d Cong., 1st Sess. 9 (1971).

III

IN ARMY RETIRED PAY, THE CONGRESS ALLOWS THE FORMER MEMBER CURRENT PAY ON A REDUCED BASIS FOR REDUCED SERVICES, BASED PRIMARILY UPON HIS VULNERABILITY TO RECALL TO ACTIVE SERVICE. SUCH CURRENT PAY CANNOT BE DIVERTED BY CALIFORNIA'S DIVORCE COURTS

California has applied its own law to characterize Army retired pay as a pension given by the Army as compensation to a former member for past services.[59]

If federal law characterized Army retired pay as divisible property, California courts could look to community property law as to how to divide such property.[60] But federal law does not so characterize it. On the contrary, Army retired pay has none of the usual incidents associated with divisible property.[61]

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[59]California decisions do not distinguish between pensions, retirement and retired or retainer pay. Even where Army retired pay or Navy retainer pay is concerned, California courts loosely refer to them as pensions. *Fithian v. Fithian*, 10 Cal.3d 592, 111 Cal.Rptr. 369 (1974), *cert. denied* 419 U.S. 829 (1974); *In re Marriage of Milhan*, 27 Cal.3d 765 (1980).

Pensions represent a gratuity for past services performed. *Andrews v. United States*, 175 Ct.Cl. 561, 562-63 (1966); *Lemly v. United States*, 109 Ct.Cl. 760, 75 F.Supp. 248 (1948); *Cf. United States v. Larionoff*, 431 U.S. 864, 878 (1977). "Retirement" pay sometimes refers to retainer pay. The current terms for the pay of former members of regular components of the Army is "retired pay;" for the Navy it is "retainer pay." 10 U.S.C. § 1401(a).

[60]*Yiatchos v. Yiatchos*, 376 U.S. 306, 309 (1964); *Free v. Bland*, 369 U.S. 663, 666 (1962); *McCune v. Essig*, 199 U.S. 382, 387-390 (1905).

[61]It has no loan or redemption value and cannot be passed on by the former member by testamentary disposition. *U.S. v. Williams*, 279 Md.App. 673, 370 A.2d 1134 (1977); *Savage v. Savage*,

For over 100 years Army retired pay has been recognized as a continuation of active duty pay—in the nature of reduced pay for reduced services.[62] This characterization is so well anchored that it is unthinkable that the Congress

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374 N.E.2d 536 (Ind. 1978); *Baker v. Baker,* 546 P.2d 1325 (Okla. 1976).

Army retired pay is not protected by the fifth amendment against abolition or reduction by the Congress. *Costello v. United States,* 587 F.2d 424 (9th Cir. 1978). The Congress has in fact reduced retired pay by formula in the Dual Compensation Act, 5 U.S.C. § 5532. That reduction has withstood constitutional challenge on fifth amendment grounds, *Puglisi v. United States,* 564 F.2d 403 (Ct.Cl. 1977), *cert. denied* 435 U.S. 968 (1978); *Cf.* 59 Comp. Gen. . . . (B-196825 and B-183828, May 20, 1980).

[62]The principal was first stated in *United States v. Tyler,* 105 U.S. 244, 26 L. Ed. 985 (1881) that "Compensation is continued at a reduced rate, and the connection is continued, with the retirement from active service only." The court added the following:

> "It is impossible to hold that men who are by statute declared to be a part of the Army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still *not* in the military service."
>
> "If Congress chose to provide for their qualified relief from active duty, and for a diminished compensation, it did not discharge them from their other obligations as part of the Army of the United States." 105 U.S. at 246.

One hundred years later, the characterization of Army retired pay is the same. In *Costello v. United States,* 587 F.2d 424, 427 (9th Cir. 1978), *cert. denied* 442 U.S. 929 (1979), the same point is made: "[R]etirement pay does not differ from active duty pay in its character as pay for continuing military service."

has ever conceived of Army retired pay in any other fashion.[63]

The primary modern justification for this characterization lies in the vulnerability of the military retiree to recall to active duty.[64] But there are other justifications as well.[65]

California errs in believing itself free to apply state law to characterize the federally created right. State law will find divisible property even where the Congress has created a non-divisible right, so recognized from time immemorial by the federal courts. If federal law applies—

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[63]The federal cases are uniform and legion in describing retired pay as reduced pay for reduced services. *Kahn v. Anderson,* 255 U.S. 1 (1920); *United States v. Morton,* 112 U.S. 1 (1884); *United States v. Mills,* 197 U.S. 223 (1904); *Leonard v. United States,* 279 U.S. 40 (1928); *Puglisi v. United States,* 564 F.2d 403 (Ct.Cl. 1977), *cert denied;* 435 U.S. 968 (1978); *Lockhart v. Mittlemann,* 123 F.2d 703 (2d Cir. 1941); *Lemly v. United States,* 75 F.Supp. 248 (Ct.Cl. 1948); *A. L. Abbott v. United States,* 200 Ct.Cl. 384 (1973); *Andrews v. United States,* 175 Ct.Cl. 561 (1966); *Watson v. Watson,* 424 F.Supp. 866 (E.D. N.C. 1976); *Chambers v. Russell,* 192 F.Supp. 425 (N.D. Cal. 1961); *Hooper v. Hartman,* 163 F.Supp. 437 (S.D. Cal. 1958), affirmed 274 F.2d 429 (9th Cir. 1959); *Jones v. United States,* 185 F.Supp. 347 (E.D. N.Y. 1960); *Hoeppel v. Westover,* 79 F.Supp. 794 (S.D. Cal. 1948).

Many state cases reach the same result. *United States v. Williams,* 279 Md.App. 673, 370 A.2d 1134 (1977); *J. M. Court v. Commonwealth,* 207 Va. 556, 151 S.E. 2d 384 (1966); *Elmwood v. Elmwood,* 295 N.C. 168, 244 S.E. 2d 668 (1978); *Harris v. Harris,* 40 N.C. App. 26, 252 S.E. 2d 95 (1979). See also, 43 Comp. Gen. 785 (1964); and 41 Comp. Gen. 715 (1962).

[64]The recall statutes are overlapping and numerous. See 10 U.S.C. § 3504(a) (for Army and Air Force); 10 U.S.C. § 675 (ordering to active duty retired reservists without their consent); 14 U.S.C. § 331 (ordering any retired officer to active duty); and 10 U.S.C. § 8504 (recall of retired Regular Air Force members). *Cf.* 41 Comp. Gen. 715, 717 (1962).

[65]See text at footnotes 11 through 18.

—as it clearly does—to define the nature of Army retired pay, the result, without question, will defeat community property division. Army retired pay is current wages and as such is not divisible after divorce.

IV

DIVORCE COURT AWARDS BASED ON COMMUNITY PROPERTY CONCEPTS INTERFERE IMPERMISSIBLY WITH THE FEDERAL SYSTEM OF CAREFULLY BALANCED BENEFITS FOR THE FORMER MEMBER RECEIVING ARMY RETIRED PAY, HIS SPOUSE, EX-SPOUSE, AND WIDOW

In *Hisquierdo*, the court noted that in the Railroad Retirement Act the Congress had provided benefits to a worker's spouse. These benefits terminated, however, when the spouse and the employee were absolutely divorced. 439 U.S. at 575. In a further observation the Court noted that "[T]he burden of marital dissolution may be particularly onerous for a spouse who, unlike respondent, has no expectation of receiving his or her own social security benefits." 439 U.S. at 590. The Court also took note that the Congressional decision to cut off a spouse after a divorce was a deliberate choice. 439 U.S. at 590.

The package of retirement benefits selected by the Congress for the military retiree ties into the Social Security System and protects the retired member, his spouse, widow and ex-spouse. While in active service, the Army member contributes to the Social Security scheme by means of involuntary deductions from pay. Benefits to the spouse and to the ex-spouse inhere solely by virtue of his contributions; the non-Army spouse is not required to make any contributions of her own to the system. Unlike benefits under the Railroad Retirement scheme, the ex-spouse here receives a benefit in her own right. 42 U.S.C. § 402(b). The ex-spouse who takes half the Army retired pay under

a community property division has thus already been provided for by the Congress through the Social Security System.[66]

The widow is also protected by Social Security. She has, however, a favored status over the ex-spouse as an eligible beneficiary under the annuity program. The serviceman can provide for his surviving spouse through contributions deducted from his retired pay. In both the Retired Serviceman's Family Protection Plan and in the Survivor's Benefit Plan, the Congress has chosen to protect only the "widow", (i.e., a woman who survives as his wife)[67] and the "surviving spouse."[67.1]

The choice was deliberate. It can be seen from the 1968 amendment to the Retired Serviceman's Family Protection Plan, 10 U.S.C. § 1434(c), which bars further deductions from retired pay when the spouse can no longer be a beneficiary. This was done "[t]o safeguard the participant's future retired pay when . . . a divorce occurs."[68] Provisions for protection of ex-wives were stricken by the Senate, after the House version had initially adopted them.[68.1]

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[66]The Congress has provided for her even though it has provided no Social Security benefits for the spouse of the member in the Federal Civil or Foreign Service. Neither of those programs is tied into Social Security. 42 U.S.C. § 410(a)(6)(A).

[67]10 U.S.C. §§ 1447(3), 1450(a); 10 U.S.C. §§ 1434, 1435; 32 C.F.R. § 48.303.

[67.1]10 U.S.C. §§ 1434(a) and (d).

[68]Statement by the Department of Defense which insisted upon this amendment. S.Rep. No. 1480, 90th Cong., 2d Sess. (1968), *reprinted in* [1968] U.S. Code Cong. & Ad. News 3294, 3300.

[68.1]118 Cong. Rec. H-8255 (daily ed. Dec. 8, 1975); *Goldberg, supra,* note 24, at 89.

The Congressional scheme observable in the annuity programs is simply not compatible with community property awards of Army retired pay:

(1) The former member is compelled by State law to share retired pay with an ex-wife whom Congress deliberately rendered ineligible for voluntary coverage.

(2) Under the Survivor Benefit Plan, the annuity to the widow is terminated upon her remarriage. 10 U.S.C. § 1450. But the ex-spouse is not subject to any such limitation. She takes retired pay from unrelated tangible property, and uses that property as she wishes or, she may take an allocable share of the monthly retired pay received by the retiree and may remarry without terminating her benefits. "Thus one is forced to conclude either that the objects of Congress' bounty are to be treated worse than those it neglected, or, perhaps more logically that those it neglected have no community property rights."[69]

(3) Since the contributions to each of the annuity programs are made from retired pay, it should follow that if retired pay is in fact community property the ex-spouse should have an interest in the annuity itself.[70] This has been the result in community property states with respect to insurance benefits.[71] The ex-spouse would, if permitted by federal law, take a portion of both the retired pay and the annuity.

But the Congress devised the benefit program to care for the widow—not for the ex-spouse. It intended retired pay to care for the Army retiree. If the ex-spouse takes only a

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[69]*Goldberg, id.*

[70]It is a feature of community property law that "property purchased with community property retains a community character" *Free v. Bland*, 369 U.S. 663, 664 (1962).

[71]See *Wissner v. Wissner*, 338 U.S. 655, 659 (1949).

portion of the retired pay, she is already preferred to the widow with an annuity. The widow's annuity will be reduced by the Social Security offset. 10 U.S.C. § 1451. But the ex-spouse's share in the retired pay is not reduced by an offset attributable to her Social Security benefits, since the offset applies only to the annuity.

(4) The annuity programs are part of a consistent Congressional pattern. Death benefits are awarded only to a surviving spouse and not to an ex-spouse. 10 U.S.C. § 1447(3). Benefits provided as Disability and Indemnity Compensation are also routed only to a surviving spouse. 38 U.S.C. § 410(a).

(5) Accrued but unpaid arrearages in Army retired pay pass by a mode of testamentary disposition allowed by federal law. 10 U.S.C. § 2771. The serviceman's right of testamentary disposition, granted to him by the Congress, cannot be undermined by allowing a state right of recovery, under community property principles, by an ex-spouse from the serviceman's designated beneficiary.[72] The claim by an ex-spouse for an allocable share of Army retired pay is simply repugnant to the Congressional dictate, informed by legislative history, that the serviceman shall have the freedom to choose his designated beneficiary in such accrued but unpaid retired pay.[73] It cannot be that the Congress intended one result for Army retired pay accrued but unpaid at the time of death and another result for all other retired pay.

(6) When an ex-spouse takes half the monthly retired pay, there is a positive disincentive on the former member to participate in the annuity program to benefit his children

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[72] *Cf. Wissner v. Wissner*, 338 U.S. 655, 659 (1949) and *Free v. Bland*, 369 U.S. 663, 669 (1962).

[73] *See* H.R. Rep. No. 833, 84th Cong., 2d Sess. (1955), *reprinted in* [1955] U.S. Code Cong. & Ad. News 2434, 2435, 2438.

or new spouse. The Congress has modified the annuity program to make it more attractive to the retiree.[74] Community property awards of Army retired pay may so reduce the amount remaining of retired pay that the retiree must pay a much higher proportion of his remaining share to secure the benefits of the annuity plan.

The delicate balance among the statutory programs which bear upon the Army retiree does not allow a one-track state initiative concerned only with equal division of property at the time of divorce. The State's preference for a distinct social policy is repugnant to federal statutory pattern, its underlying purposes, and to the balance struck by the Congress in fashioning benefits and remunerations suitable for the achievement of national objectives.

V

THE CONGRESS HAS RECOGNIZED THE RIGHT OF THE SPOUSE TO INVADE ARMY RETIRED PAY BASED UPON HER NEED; BUT IT HAS NOT RECOGNIZED HER RIGHT TO DO SO BASED UPON HER PROPERTY INTEREST IN SUCH PAY

In the 1975 Social Security Amendments, 42 U.S.C. § 659(a) (as clarified in 1977 by 42 U.S.C. § 662(c)), the Congress adopted a policy preference for enforcing support obligations created by state court awards. The provisions accord no special status to community property awards. The same set of policy preferences have been set in place in the Federal Bankruptcy Act. 11 U.S.C. § 523(a) (5).

Community property states are few in number. The majority of the states are concerned with equitable division

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[74]The program as originally established was actuarially sound and hence quite expensive. It has been modified so that the contributions from retired pay account are roughly half of sums needed to pay benefits. *See Goldberg, supra,* note 24, at 17.

of property at the time of divorce, with alimony, and with child support. To this end, most states have enacted the Uniform Reciprocal Enforcement of Support Act, as has California.[75] It is understandable, in these circumstances, that the Congress would proceed with caution before accommodating the social policy preferences of a minority of states in matters affecting military retired pay.

It is far from clear that, as social policy, an equal division of Army retired pay would represent wise social policy. The Congress has no doubt taken the following considerations into account in modifying §§ 701(a) and (c) only for support payments:

(1) Invading retired pay to enforce a support order represents only a temporary invasion of the retired pay of the former member. Dependent children become adults and end their dependency; the ex-spouse marries, dies, or becomes financially independent.

An amount not based upon need, all too frequently creates inequality rather than equality. The ex-spouse marries and acquires a profitable arrangement; or dies; or becomes far more financially solvent than the former member. There is in these situations no undoing the original community property division of the retired pay.

(2) An ex-spouse can receive support from the former member's retired pay even when the state correctly characterizes retired pay as reduced wages for reduced services. Under such characterization, Army retired pay is the separate property of the former member after divorce. But separate property can be invaded to support an ex-spouse. Cal. Civ. Code § 4806. The divorce court will retain jurisdiction to review the matter from time to time as conditions change. (*Compare,* J.A. 44, lines 1-2; 59, lines 13-

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[75]Cal. Civ. Code §§ 5150 *et seq.*

24). This is surely preferable to pushing the retired member to seek relief in bankruptcy.

(3) Community property principles are not concerned with fault. California also has no-fault divorce. Civil Code § 4506. But a prospective award of alimony may be burdened with special considerations. Cal. Civ. Code § 5480(a)(9). If Army retired pay is current wages, the wife claims alimony and special considerations are relevant; if retired pay is divisible property, she claims an automatic equal share and special considerations are not relevant.[76]

(4) Army retired pay is so much the equivalent of wages, that acceptance of state awards based upon community property concepts may simply be too radical a step for the Congress to take. States following equitable division of property in divorce do not classify Army retirement pay as marital property, capable of division.[77] A congressional enactment allowing local option by the states to treat retired pay as community property would cause confusion as to the basic nature of Army retired pay. A policy choice, as represented in the Social Security enactments, favoring invasion of retired pay for support only, avoids that dilemma.

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[76]The wife in this case was awarded support (J.A. 44). The amount of support was less than the wife requested. Compare J.A. 44 with J.A. 15. The Superior Court Judge retained jurisdiction to consider circumstances as they might change, on the basis of need. (J.A. 44). The Superior Court Judge was aware of, and may well have considered, the causes for the "irremediable breakdown" (J.A. 53-54) of the marriage in establishing the amount of support. *See*, J.A. 40.

[77]*E.g.*, *United States v. Williams*, 279 Md. 673, 370 A.2d 1134 (1977); *Savage v. Savage*, 374 N.E.2d 536 (Ind. 1978); *Baker v. Baker*, 546 P.2d 1325 (Okla. 1976).

VI
CONCLUSION

As applied to the Husband in this case, California's quasi-community property scheme is repugnant to federal statutes which establish and protect Army retired pay as a personal entitlement of a former Army member. Property divisions of Army retired pay do great damage to important federal interests. These divisions undermine the flow of incentives established by the Congress in the retirement statutes. They conflict with the measured distribution of benefits which the Congress directed in interrelated legislation towards the former Army member, his ex-spouse, and his widow. They conflict impermissibly with Army-pay anti-assignment provisions, 37 U.S.C. §§ 701(a) and (c), which ensure that Army pay shall reach the serviceman without anticipation from the claims of creditors.

The summation by this Court in *Hisquierdo,* 439 U.S. 572, 590, applies here with equal force:

> [T]he community property interest that respondent seeks conflicts with [§§ 701(a) and (c)], promises to diminish that portion of the benefit Congress has said should go to the [former Army member] alone, and threatens to penalize one whom Congress has sought to protect. It thus causes the kind of injury to federal interests that the Supremacy Clause forbids. It is not the province of state courts to strike a balance different from the one Congress has struck.

The Court is requested to reverse the decision of the California Court of Appeal and to direct that Court to issue

an order allowing the Husband to retrieve and retain those funds which the Husband has deposited into a trust account out of his Army retired pay, pending resolution of all appeals, as the portion allocated to the Wife by the Court of Appeal.

Respectfully submitted,

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December 4, 1980

APPENDIX

Texts of Statutes Referred to in Memorandum:

Constitution of the United States, Article VI, Clause 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

5 U.S.C. § 8345(j)(1) (Civil Service Retirement Act).

Payments under this subchapter which would otherwise be made to an employee, Member, or annuitant based upon his service shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation. Any payment under this paragraph to a person bars recovery by any other person.

5 U.S.C. § 5532 (Dual Compensation Act).

(a) For the purpose of this section, "period for which he receives pay" means the full calendar period for which a retired officer of a regular component of a uniformed service receives the pay of a position when employed on a full-time basis, but only the days for which he actually receives that pay when employed on a part-time or intermittent basis.

(b) A retired officer of a regular component of a uniformed service who holds a position is entitled to receive

the full pay of the position, but during the period for which he receives pay, his retired or retainer pay shall be reduced to an annual rate equal to the first $2,000 of the retired or retainer pay plus one-half of the remainder, if any. In the operation of the formula for the reduction of retired or retainer pay under this subsection, the amount of $2,000 shall be increased, from time to time, by appropriate percentage, in direct proportion to each increase in retired or retainer pay under section 1401a(b) of title 10 to reflect changes in the Consumer Price Index.

(c)(1) If any member or former member of a uniformed service is receiving retired or retainer pay and is employed in a position the annual rate of basic pay for which, when combined with the member's annual rate of retired or retainer pay (reduced as provided under subsection (b) of this section), exceeds the rate of basic pay then currently paid for level V of the Executive Schedule, such member's retired or retainer pay shall be reduced by an amount computed under paragraph (2) of this subsection. The amounts of the reduction shall be deposited to the general fund of the Treasury of the United States.

(2) The amount of each reduction under paragraph (1) of this subsection allocable for any pay period in connection with employment in a position shall be equal to the retired or retainer pay allocable to the pay period (reduced as provided under subsection (b) of this section), except that the amount of the reduction may not result in—

(A) the amount of retired or retainer pay allocable to the pay period after being reduced, when combined with the basic pay for the employment during the pay period, being at a rate less than the rate of basic pay then currently paid for level V of the Executive Schedule; or

(B) the amount of retired pay or retainer pay being reduced to an amount less than the amount deducted from

the retired or retainer pay as a result of participation in any survivor's benefits in connection with the retired or retainer pay or veterans insurance programs.

10 U.S.C. § 227(a) (Final Settlement of Accounts: Deceased Members).

(a) In the settlement of the accounts of a deceased member of the armed forces who dies after December 31, 1955, an amount due from the armed force of which he was a member shall be paid to the person highest on the following list living on the date of death:

(1) Beneficiary designated by him in writing to receive such an amount, if the designation is received, before the deceased member's death, at the place named in regulations to be prescribed by the Secretary concerned.

(2) Surviving spouse.

(3) Children and their descendants, by representation.

(4) Father and mother in equal parts or, if either is dead, the survivor.

(5) Legal representative.

(6) Person entitled under the law of the domicile of the deceased member.

10 U.S.C. § 675 (Recall, Retired Person).

A member in the Retired Reserve may, if qualified, be ordered to active duty without his consent, but only as provided in section 672(a) of this title.

10 U.S.C. § 802 (Code of Military Justice, Persons Subject to).

The following persons are subject to this chapter:

* * * * *

(4) Retired members of a regular component of the armed forces who are entitled to pay.

10 U.S.C. § 886 (Absence Without Leave).

Any member of the armed forces who, without authority—

(1) fails to go to his appointed place of duty at the time prescribed;

(2) goes from that place; or

(3) absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed;

shall be punished as a court-martial may direct.

10 U.S.C. § 1335 (Recall to Inactive Status List).

(a) A person who would be eligible for retired pay under this chapter but for the fact that he is under 60 years of age may be transferred, at his request and by direction of the Secretary concerned, to such inactive status list as may be established for members of his armed force, other than members of a regular component.

(b) While on an inactive status list under subsection (a), a person is not required to participate in any training or other program prescribed for his component.

(c) The Secretary may at any time recall to active status a member who is on an inactive status list under subsection (a).

10 U.S.C. § 1434 (Kinds of Annuities that may be Elected).

(a) The annuity that a person is entitled to elect under section 1431 or 1432 of this title shall, in conformance with actuarial tables selected by the Board of Actuaries under section 1436(a) of this title, be the amount specified by the elector at the time of the election, but not more than 50 per centum nor less than 12½ per centum of his retired or

retainer pay, in no case less than $25. He may make the annuity payable—

(1) to, or on behalf of, the surviving spouse, ending when the spouse dies or, if the spouse remarries before age 60, when the spouse remarries;

(2) in equal shares to, or on behalf of, the surviving children eligible for the annuity at the time each payment is due, ending when there is no surviving eligible child; or

(3) to or on behalf of, the surviving spouse, and after the death of that spouse or the remarriage of that spouse before age 60, in equal shares to, or on behalf of, the surviving eligible children, ending when there is no surviving eligible child.

10 U.S.C. § 1440 (Annuities not Subject to Legal Process).

No annuity payable under this subchapter is assignable or subject to execution, levy, attachment, garnishment, or other legal process.

10 U.S.C. § 1447 (Survivor Benefit Plan, Definitions).

(3) "Widow" means the surviving wife of a person who, if not married to the person at the time he became eligible for retired or retainer pay—

(A) was married to him for at least one year immediately before his death; or

(B) is the mother of issue by that marriage.

10 U.S.C. § 1450 (Payment of Annuity; Beneficiaries) (Armed Forces).

(a) Effective as of the first day after the death of a person to whom section 1448 of this title applies (or on such other day as he may provide under subsection (j)),

a month's annuity under section 1451 of this title shall be paid to—

(1) the elegible widow or widower;

(2) the surviving dependent children in equal shares, if the eligible widow or widower is dead, dies, or otherwise becomes ineligible under this section;

(3) the dependent children in equal shares if the person to whom section 1448 of this title applies elected to provide an annuity for dependent children but not for the spouse; or

(4) the natural person designated under section 1448(b) of this title at the time the person to whom section 1448 applies becomes entitled to retired or retainer pay, if there is no eligible beneficiary under clause (1) or (2).

(b) An annuity payable to the beneficiary terminates effective as of the first day of the month in which eligibility is lost. An annuity for a widow or widower shall be paid to the widow or widower while the widow or widower is living, or if the widow or widower remarries before reaching age 60, until the widow or widower remarries. If the widow or widower remarries before reaching age 60 and that marriage is terminated by death, annulment, or divorce, payment of the annuity shall be resumed effective as of the first day of the month in which the marriage is so terminated. However, if the widow or widower is also entitled to an annuity under this section based upon the marriage so terminated, the widow or widower may not receive both annuities but must elect which to receive.

(c) If, upon the death of a person to whom section 1448 of this title applies, the widow or widower of that person is also entitled to compensation under section 411(a) of title 38, the widow or widower may be paid an annuity under this section, but only in the amount that the annuity

otherwise payable under this section would exceed that compensation.

(d) If, upon the death of a person to whom section 1448 of this title applies, that person had in effect a waiver of his retired or retainer pay for the purposes of subchapter III of chapter 83 of title 5, an annuity under this section shall not be payable unless, in accordance with section 8339(j) of title 5, he notified the Civil Service Commission that he did not desire any spouse surviving him to receive an annuity under section 8341(b) of that title.

(e) If no annuity under this section is payable because of subsection (c), any amounts deducted from the retired or retainer pay of the deceased under section 1452 of this title shall be refunded to the widow or widower. If, because of subsection (c), the annuity payable is less than the amount established under section 1451 of this title, the annuity payable shall be recalculated under that section. The amount of the reduction in the retired or retainer pay required to provide that recalculated annuity shall be computed under section 1452 of this title, and the difference between the amount deducted prior to the computation of that recalculated annuity and the amount that would have been deducted on the basis of that recalculated annuity shall be refunded to the widow or widower.

(f) An unmarried person who elects to provide an annuity to a person designated by him under subsection (a) (3), but who later marries or acquires a dependent child, may change that election and provide an annuity to his spouse or dependent child. A change of election under this subsection is subject to the rules with respect to execution, revocation, and effectiveness set forth in the last three sentences of section 1448(a) of this title.

(g) Except as provided in section 1449 of this title or in subsection (f) of this section, an election under this section may not be changed or revoked.

(h) Except as provided in section 1451 of this title, an annuity under this section is in addition to any other payment to which a person is entitled under any other provision of law. Such annuity shall be considered as income under laws administered by the Veterans' Administration.

(i) An annuity under this section is not assignable or subject to execution, levy, attachment, garnishment, or other legal process.

10 U.S.C. § 2771 (Final Settlement of Accounts, Deceased Members).

(a) In the settlement of the accounts of a deceased member of the armed forces who dies after December 31, 1955, an amount due from the armed force of which he was a member shall be paid to the person highest on the following list living on the date of death:

(1) Beneficiary designated by him in writing to receive such an amount, if the designation is received, before the deceased member's death, at the place named in regulations to be prescribed by the Secretary concerned.

(2) Surviving spouse.

(3) Children and their descendants, by representation.

(4) Father and mother in equal parts or, if either is dead, the survivor.

(5) Legal representative.

(6) Person entitled under the law of the domicile of the deceased member.

(b) Designations and changes of designation of beneficiaries under subsection (a)(1) are subject to regulations to be prescribed by the Secretary concerned. So far as practicable, these regulations shall be uniform for the armed forces, the Environmental Science Services Administration, and the Public Health Service.

(c) Under such regulations as the Comptroller General may prescribe, payments under subsection (a) shall be made by the military department concerned or the Department of the Treasury, as the case may be. Payment under clause (6) of subsection (a) shall be made—

(1) upon settlement by the General Accounting Office; or

(2) as otherwise authorized by the Comptroller General.

(d) A payment under this section bars recovery by any other person of the amount paid.

10 U.S.C. § 3504(a) (Recall to Active Duty).

The President may order any retired member of the Regular Army to active duty. He may assign a member ordered under this subsection to such duties as he considers necessary in the interests of national defense.

10 U.S.C. § 3889 (Computation of Length of Service Retired Pay).

A member of the Army retired under this chapter is entitled to retired pay computed under chapter 371 of this title.

10 U.S.C. § 3911 (Retirement).

The Secretary of the Army may, upon the officer's request, retire a regular commissioned officer of the Army

who has at least 20 years of service computed under section 3926 of this title, at least 10 years of which have been active service as a commissioned officer.

10 U.S.C. § 3913 (Deferred Officers Not Recommended for Promotion).

(a) A deferred officer who is not recommended for promotion under section 3303(c) of this title, or an officer who is found disqualified for promotion under section 3302(f) of this title, shall, if he has at least 20 years of service computed under section 3927(a) of this title, be retired, except as provided by section 8301 of title 5, on such date as may be requested by him and approved under regulations to be prescribed by the Secretary of the Army, but not later than the first day of the seventh calendar month after the Secretary approves the report of the last board that did not recommend him for promotion to the grade concerned.

(b) Unless sooner retired or separated under another provision of law, a deferred officer who is not recommended for promotion under section 3303(c) of this title, or an officer found disqualified for promotion under sec-3302(f) of this title, who is not eligible for retirement under subsection (a) of this section or any other provision of law, but is within two years of becoming entitled to retirement under subsection (a) or some other provision of law, shall be retained on the active list in his regular grade until the date he completes 20 years of service computed under section 3927(a) of this title, or the first day of the seventh calendar month after the Secretary approves the report of the last board that did not recommend him for promotion to the grade concerned, whichever is later, and then retired.

10 U.S.C. § 3914 (Twenty to Thirty Years: Regular Enlisted Members Retirement).

Under regulations to be prescribed by the Secretary of the Army, a regular enlisted member of the Army who has at least 20, but less than 30, years of service computed under section 3925 of this title may, upon his request, be retired. He then becomes a member of the Army Reserve, and shall perform such active duty as may be prescribed under law, until his service computed under section 3925 of this title, plus his inactive service as a member of the Army Reserve, equals 30 years

10 U.S.C. § 3915 (Twenty-Five Years: Women's Army Retirement).

(a) Unless retired or separated at an earlier date, each officer of the Women's Army Corps whose regular grade is major shall be retired, except as provided by section 47a of title 5, on the thirtieth day after she completes 25 years of service computed under section 3927(a) of this title.

10 U.S.C. § 3916 (Twenty-eight Years: Promotion-List Lieutenant Colonels).

Unless retired or separated at an earlier date, each promotion-list officer in the regular grade of lieutenant colonel shall be retired, except as provided by section 8301 of title 5, on the thirtieth day after he completes 28 years of service computed under section 3927(a) of this title. However, if his name is carried on the list of officers recommended for appointment to the regular grade of colonel, he shall be retained on the active list while his name is so carried.

10 U.S.C. § 3921 (Promotion-List Colonels, Retirement).

(a) Unless retired or separated at an earlier date, each promotion-list officer in the regular grade of colonel shall

be retired, except as provided by section 8301 of title 5, on the fifth anniversary of the date of his appointment in that regular grade, or on the thirtieth day after he completes 30 years of service computed under section 3927(a) of this title, whichever is later. However, if his name is carried on the list of officers recommended for appointment to the regular grade of brigadier general, he shall be retained on the active list while his name is so carried.

(b) The Secretary of the Army may defer the retirement under this section of any promotion-list officer in the regular grade of colonel in the Medical Corps, Dental Corps, Veterinary Corps, Medical Service Corps, or the Chaplains, but not later than the date on which he becomes 60 years of age. The number of deferments in effect under this subsection for any one promotion list at any one time may not be more than 10 per cent of the number of colonels authorized for that list.

10 U.S.C. § 3922 (Thirty Years or Five Years in Grade: Regular Brigadier Generals Retirement).

(a) Unless retired or separated at an earlier date, each officer in the regular grade of brigadier general, other than a professor of the United States Military Academy, shall be retired, except as provided by section 8301 of title 5, on the fifth anniversary of the date of his appointment in that regular grade, or on the thirtieth day after he completes 30 years of service computed under section 3927(a) of this title, whichever is later. However, if his name is carried on the list of officers recommended for appointment to the regular grade of major general, he shall be retained on the active list while his name is so carried.

10 U.S.C. § 3923 (Regular Major Generals, Retirement).

Unless retired or separated at an earlier date, each officer in the regular grade of major general shall be retired,

except as provided by section 8301 of title 5, on the fifth anniversary of the date of his appointment in that regular grade, or on the thirtieth day after he completes 35 years of service computed under section 3927(a) of this title, whichever is later. However, the Secretary of the Army may defer the retirement under this section of—

(1) any such major general, but not later than the date on which he becomes 60 years of age; and

(2) any such major general who is serving in a temporary grade above major general, or who is serving in a position that carries a grade above major general, but not later than the date on which he becomes 64 years of age; and not more than five deferments under this clause may be in effect at any one time.

10 U.S.C. § 3929 (Computation of Old Age Retired Pay).

A member of the Army retired under this chapter is entitled to retired pay computed under chapter 371 of this title.

10 U.S.C. § 6482 (Authority to Recall Retired Enlisted Members of Regular Navy and Marine Corps).

In time of war or national emergency the Secretary of the Navy may order to active duty any retired enlisted member of the Regular Navy or the Regular Marine Corps.

10 U.S.C. § 8504 (Retired Members, Air Force).

(a) The President may order any retired member of the Regular Air Force to active duty. He may assign a member ordered under this subsection to such duties as he considers necessary in the interest of national defense.

11 U.S.C. § 523(a)(5) (Federal Bankruptcy Act) (Exceptions to discharge).

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt—

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or property settlement agreement, but not to the extent that—

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

14 U.S.C. § 331 (Recall to Duty: Retired Regular Coast Guard).

In time of war or national emergency, the Secretary may order any regular officer on the retired list to active duty.

15 U.S.C. § 1673 (Garnishment Provisions).

(a) Except as provided in subsection (b) of this section and in section 1675 of this title, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed

(1) 25 per centum of his disposable earnings for that week, or

(2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 206(a)(1) of Title 29 in effect at the time the earnings are payable, whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple

of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).

Exceptions

(b)(1) The restrictions of subsection (a) of this section do not apply in the case of

(A) any order for the support of any person issued by a court of competent jurisdiction or in accordance with an administrative procedure, which is established by State law, which affords substantial due process, and which is subject to judicial review.

(B) any order of any court of the United States having jurisdiction over cases under chapter 13 of Title 11.

(C) any debt due for any State or Federal tax

(2) The maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed—

(A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings for that week; and

(B) where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week;

except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be deemed to be 65 per centum, if and to the extent that such earnings are subject to garnishment to enforce a support order with

respect to a period which is prior to the twelve-week period which ends with the beginning of such workweek.

Execution or enforcement of garnishment order or process prohibited.

(c) No court of the United States or any State, and no State (or officer or agency thereof), may make, execute, or enforce any order or process in violation of this section.

18 U.S.C. § 281 (Claims and Services in Matters Affecting Government (retained in force only for retired officers from the Armed Forces of United States by 76 Stat. 116 (1962); Note following 18 U.S.C.A. § 281 (Supp. 1980)).

Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status.

22 U.S.C. § 1104 (Foreign Service Act of 1980, § 820, P. L. 96-465).

(a) (1) An individual entitled to an annuity from the Fund may make allotments or assignments of amounts from such annuity for such purposes as the Secretary of State in his or her sole discretion considers appropriate.

(2) Notwithstanding section 3477 of the Revised Statutes of the United States (31 U.S.C. 203) or any other law, a member of the Service who is entitled to receive benefits under section 609(b) (1) may assign to any person the whole or any part of those benefits. Any such assignment shall be on a form approved by the Secretary of the Treasury and a copy of such assignment form shall be deposited with the Secretary of the Treasury by the member executing the assignment.

(b) (1) (A) In the case of any participant or annuitant who has a former spouse who is covered by a court order or who is a party to a spousal agreement—

(i) any right of the former spouse to any annuity under section 814(a) in connection with any retirement or disability annuity of the participant, and the amount of any such annuity;

(ii) any right of the former spouse to a survivor annuity under section 814(b) or (c), and the amount of any such annuity; and

(iii) any right of the former spouse to any payment of a lump-sum credit under section 815(a) or (b);

shall be determined in accordance with that spousal agreement or court order, if and to the extent expressly provided for in the terms of that spousal agreement or court order.

(B) This paragraph shall not apply in the case of any spousal agreement or court order which, as determined by the Secretary of State—

(i) would provide for a survivor annuity for a spouse or any former spouse of a participant with respect to which there has not been an annuity reduction (or a salary reduction or payment under section 814(c)(3); or

(ii) is otherwise inconsistent with the requirements of this chapter.

(2) Except with respect to obligations between participants and former spouses, payments under this chapter which would otherwise be made to a participant or annuitant based upon his or her service shall be paid (in whole or in part) by the Secretary of State to another individual to the extent expressly provided for in the terms of any order or any court decree of legal separation, or the terms

of any court order or court-approved property settlement agreement incident to any court decree of legal separation.

31 U.S.C. § 203 (Assignment of Claims; Set-off against Assignee.)

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.

Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors.

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: *Provided,*

1. That in the case of any contract entered into prior to October 9, 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

2. That in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section, shall constitute a valid assignment for all purposes.

In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or set-off, and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of (1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract, (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract), or (4) taxes, social security contributions, or the withholding or nonwithholding of taxes or social security contributions, whether arising from or independently of such contract.

Except as herein otherwise provided, nothing in this section shall be deemed to affect or impair rights or obligations heretofore accrued.

37 U.S.C. § 701 (Army/Air Force Anti-Assignment Act).

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, a commissioned officer of the Army or the Air Force may transfer or assign his pay account, when due and payable.

* * * * *

(c) An enlisted member of the Army or the Air Force may not assign his pay, and if he does so, the assignment is void.

38 U.S.C. § 410(a) (Dependency and Indemnity Compensation).

When any veteran dies after December 31, 1956, from a service-connected or compensable disability, the Administrator shall pay dependency and indemnity compensation to such veteran's surviving spouse, children, and parents.

41 U.S.C. § 15 (First Paragraph (Anti-Assignment)).

No contract or order, or any interest therein, shall be transferred to the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

42 U.S.C. § 402 (Social Security Act).

Wife's insurance benefits

(b)(1) The wife (as defined in section 416(b) of this title) and every divorced wife (as defined in section 416(d) of this title) of an individual entitled to old-age or disability insurance benefits, if such wife or such divorced wife—

(A) has filed application for wife's insurance benefits,

(B) has attained age 62 or (in the case of a wife) has in her care (individually or jointly with such individual) at the time of filing such application a child entitled to a child's insurance benefit on the basis of wages and self-employment income of such individual,

(C) in the case of a divorced wife, is not married, and

(D) is not entitled to old-age or disability insurance benefits or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of such individual, shall (subject to subsection(s) of this section) be entitled to the wife's insurance benefit for each month, beginning with the first month in which she becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs—

(E) she dies,

(F) such individual dies,

(G) in the case of a wife, they are divorced and either (i) she has not attained age 62, or (ii) she has attained age 62 but has not been married to such individual for a period of 10 years immediately before the date the divorce became effective,

(H) in the case of divorced wife, she marries a person other than such individual,

(I) in the case of wife who has not attained age 62, the child of such individual is entitled to a child's insurance benefit,

(J) she becomes entitled to an old-age or disability insurance benefit based on a primary insurance amount which is equal to or exceeds one-half of the primary insurance amount of such individual, or

(K) such individual is not entitled to disability insurance benefits and is not entitled to old-age insurance benefits.

(2) Except as provided in subsection (q) of this section and paragraph (4) of this subsection, such wife's insurance benefit for each month shall be equal to one-half of the primary insurance amount of her husband (or, in the case of a divorced wife, her former husband) for such month.

(3) In the case of any divorced wife who marries—

(A) an individual entitled to benefits under subsection (f) or (h) of this section, or

(B) an individual who has attained the age of 18 and is entitled to benefits under subsection (d) of this section,

such divorced wife's entitlement to benefits under this subsection shall, notwithstanding the provisions of paragraph (1) (but subject to subsection (s) of this section), not be terminated by reason of such marriage; except that, in the case of such a marriage to an individual entitled to benefits under subsection (d) of this section, the preceding provisions of this paragraph shall not apply with respect to benefits for months after the last month for which such individual is entitled to such benefits under subsection (d) of this section unless he ceases to be so entitled by reason of his death.

(4)(A) The amount of a wife's insurance benefit for such month as determined after application of the provisions of subsections (q) and (k) of this section shall be reduced (but not below zero) by an amount equal to the amount of any monthly periodic benefit payable to such wife (or divorced wife) for such month which is based upon her earnings while in the service of the Federal Government or any State (or political subdivision

thereof, as defined in section 418(b)(2) of this title) if, on the last day she was employed by such entity, such service did not constitute "employment" as defined in section 410 of this title.

(B) For purposes of this paragraph, any periodic benefit which otherwise meets the requirements of subparagraph (A), but which is paid on other than a monthly basis, shall be allocated on a basis equivalent to a monthly benefit (as determined by the Secretary) and such equivalent monthly benefit shall constitute a monthly periodic benefit for purposes of subparagraph (A). For purposes of this subparagraph, the term "periodic benefit" includes a benefit payable in a lump sum if it is a commutation of, or a substitute for, periodic payments.

42 U.S.C. § 410(a)(6)(A) (Definitions Relating to Employment).

For the purposes of this subchapter—

Employment

(a) The term "employment" means any service performed after 1936 and prior to 1951 which was employment for the purposes of this subchapter under the law applicable to the period in which such service was performed, and any service, of whatever nature, performed after 1950 either (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the

United States by a citizen of the United States as an employee (i) of an American employer (as defined in subsection (e) of this section), or (ii) of a foreign subsidiary (as defined in section 3121(*l*) of Title 26, Internal Revenue Code of 1954) of a domestic corporation (as determined in accordance with section 7701 of Title 26, Internal Revenue Code of 1954) during any period for which there is in effect an agreement, entered into pursuant to section 3121 (*l*) of Title 26, Internal Revenue Code of 1954, with respect to such subsidiary; except that, in the case of service performed after 1950, such terms shall not include—

(6)(A) Service performed in the employ of the United States or in the employ of any instrumentality of the United States, if such service is covered by a retirement system established by a law of the United States; . . .

42 U.S.C. § 410(*l*)(1)-(4) (Definitions Relating to Employment).

For the purposes of this subchapter—

* * * * *

(*l*)(1) Except as provided in paragraph (4) of this subsection, the term "employment" shall, notwithstanding the provisions of subsection (a) of this section, include service performed after December 1956 by an individual as a member of a uniformed service on active duty; but such term shall not include any such service which is performed while on leave without pay.

(2) The term "active duty" means "active duty" as described in section 1101 of Title 38, except that it shall also include "active duty for training" as described in such section.

(3) The term "inactive duty training" means "inactive duty training" as described in such section 1101 of Title 38.

(4)(A) Paragraph (1) of this subsection shall not apply in the case of any service, performed by an individual as a member of a uniformed service, which is creditable under section 231b(i) of Title 45. The Railroad Retirement Board shall notify the Secretary of Health, Education and Welfare with respect to all such service which is so creditable.

(B) In any case where benefits under this subchapter are already payable on the basis of such individual's wages and self-employment income at the time such notification (with respect to such individual) is received by the Secretary, the Secretary shall certify no further benefits for payment under this subchapter on the basis of such individual's wages and self-employment income, or shall recompute the amount of any further benefits payable on the basis of such wages and self-employment income, as may be required as a consequence of subparagraph (A) of this paragraph. No payment of a benefit to any person on the basis of such individual's wages and self-employment income, certified by the Secretary prior to the end of the month in which he receives such notification from the Railroad Retirement Board, shall be deemed by reason of this subparagraph to have been an erroneous payment or a payment to which such person was not entitled. The Secretary shall, as soon as possible after the receipt of such notification from the Railroad Retirement Board, advise such Board whether or not any such benefit will be reduced or terminated by reason of subparagraph (A) of this paragraph, and if any such benefit will be so reduced or terminated, specify the first month with respect to which such reduction or termination will be effective.

42 U.S.C. § 659(a) (Social Security Act).

(a) Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

42 U.S.C. § 662(c) (Social Security Act).

The term "alimony", when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; such term also includes attorneys' fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.

Regulations of the Army of the United States 1908, Article LXXVI, § 1277.

1277. An officer may forward his pay account to a paymaster before maturity, the amount to be remitted to the

officer when due, or placed to his credit with a bank if the account is so indorsed, but an officer will not hypothecate or transfer an account not actually due. When due it may be transferred, when the following form of indorsement will be strictly observed:

Transferred this ..... day of ....., 19....., to .... and the chief paymaster at ..... has been so notified.

(Signature) .....,

.....

When an account is so transferred, the officer will notify the chief paymaster of the department in which he is stationed, or the paymaster who has been authorized by the Paymaster-General to pay his accounts, and will instruct the person or persons to whom the account may be transferred to forward it to such paymaster for payment. A transferred account will not be paid outside of the department in which the officer is regularly paid except when it is transferred for the benefit of his family residing in another department, in which case the officer will send the notification, through the office of the chief paymaster of the department in which he is usually paid, to the chief paymaster of the department in which the payee resides; the former to forward with the notification any information he may have affecting the validity of the account.

Cal. Civil Code § 4800(b) (1) (Division of Quasi-Community Property).

(b) Notwithstanding subdivision (a), the court may divide the community property and quasi-community property of the parties as follows:

(1) Where economic circumstances warrant, the court may award any asset to one party on such conditions as it deems proper to effect a substantially equal division of the property.

Cal. Civil Code § 4801(a) (9) (Spouse Support Order and Decree of Dissolution—Modifications, Revocation, Termination).

(a) In any judgment decreeing the dissolution of a marriage or a legal separation of the parties, the court may order a party to pay for the support of the other party any amount, and for such period of time, as the court may deem just and reasonable. In making the award, the court shall consider the following circumstances of the respective parties:

(9) Any other factors which it deems just and equitable.

At the request of either party, the court shall make appropriate findings with respect to the circumstances. The court may order the party required to make such payment of support to give reasonable security therefor. Any order for support of the other party may be modified or revoked as the court may deem necessary, except as to any amount that may have occurred prior to the date of the filing of the notice of motion or order to show cause to modify or revoke. At the request of either party, the order of modification or revocation shall include findings of fact and may be made retroactive to the date of filing of the notice of motion or order to show cause to modify or revoke, or to any date subsequent thereto.

Cal. Civ. Code § 4803 (Quasi-Community Property Defined).

As used in this part, "quasi-community property" means all real or personal property, wherever situated, heretofore or hereafter acquired in any of the following ways:

(a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

Cal. Civil Code § 4804 (Quasi-community Property not Separate Property).

As used in this title and Section 5132 "separate property" does not include quasi-community property.

Cal. Civil Code § 4806 (Awards from Separate Property).

When either party in a proceeding under this part has either a separate estate, or is earning his or her own livelihood, or there is community property or quasi-community property sufficient to give him or her proper support, or if the custody of the children has been awarded to the other party, who is supporting them, the court may withhold any allowance to him out of the separate property of the other party. In any original or modification proceeding, where there are no children, and either party has or acquires a separate estate, including income from employment, sufficient for his or her proper support, no support order shall be made or continued against the other party.

Cal. Civil Code § 5105 (Interest of Parties in Community Property).

The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

Cal. Civil Code § 5118 (Earnings of Separated Spouse as Separate Property).

The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse.

Cal. Civil Code § 5125(b) (Consent of Spouse for Disposition of Property).

(b) A spouse may not make a gift of community personal property, or dispose of community personal property without a valuable consideration, without the written consent of the other spouse.

Cal. Civil Code § 5150 (Purpose of Child Custody Act).

(1) The general purposes of this title are to:

(a) Avoid jurisdiction competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being.

(b) Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child.

(c) Assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state.

(d) Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child.

(e) Deter abductions and other unilateral removals of children undertaken to obtain custody awards.

(f) Avoid relitigation of custody decisions of other states in this state insofar as feasible.

(g) Facilitate the enforcement of custody decrees of other states.

(h) Promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child.

(i) To make uniform the law of those states which enact it.

(2) This title shall be construed to promote the general purposes stated in this section.